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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ASHLAND OIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CITATIONS

Cases:

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals *en banc* (App. B, *infra*, pp. 3a-43a) is reported at 554 F. 2d 381. The opinion of a panel of the court of appeals (App. C, *infra*, pp. 44a-63a), superseded by the *en banc* opinion, is not reported. The opinion of the district court (App. D, *infra*, pp. 64a-84a) is reported at 364 F. Supp. 6.

JURISDICTION

The judgment of the court of appeals *en banc* (App. A, *infra,* pp. 1a-2a) was entered on May 10, 1977. Mr. Justice White granted extensions of the time for filing a petition for a writ of certiorari to and including October 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Helium is a non-combustible gaseous element that is found in nature intermixed with natural gas. Before 1960 helium was customarily wasted into the atmosphere when natural gas was consumed as fuel; sellers of helium-bearing natural gas customarily sought no separate price for the helium content, considering it to have little or no value. In 1960 Congress enacted a helium conservation program. Under that program the government contracted with certain companies which agreed to extract helium from natural gas they had acquired and sell it to the government, which agreed in turn to indemnify them for judgments they might have to pay for claims to the helium in excess of an agreed amount. In this case a producer-seller of helium-bearing natural gas sued the buyer of that gas (one of the companies with which the government had contracted) to recover the value of the helium content of the gas sold. The government intervened because of its contractual obligation to indemnify the buyer. The questions presented are:

1. Whether federal statutes, specifically the Natural Gas Act and the Helium Act Amendments of 1960, preclude the buyer's defense that the seller was already paid for the helium as part of the contract price for the entire gas stream.

2. If the buyer has no such defense, whether the court of appeals applied correct legal principles in determining the value of the helium for which the buyer must pay, and hence for which the government, as partial indemnitor, may be liable.

STATUTES INVOLVED

Section 11 of the Helium Act of 1925, as added by the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. 167i; and Sections 1(a) and (b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717(a) and (b), are set forth in Appendix E, *infra.*

STATEMENT

This is one of a number of pending cases in which producer-sellers of helium-bearing natural gas are suing the purchasers of that gas seeking additional compensation for the value of the helium contained in the gas sold.[1] Helium is an inert (and therefore non-combustible) gas that is found in nature intermixed with reserves of natural gas. In this country, helium is found in significant and economically extractable quantities principally in natural gas fields in Texas,

[1] The background of the litigation is described in *Northern Natural Gas Company* v. *Grounds,* 441 F. 2d 704 (C.A. 10), certiorari denied, 404 U.S. 951, 1063 (hereinafter "*Grounds*").

Oklahoma and Kansas.[2] Before 1960 helium was, in general, simply borne along by the natural gas stream from the lessee-producers of the fields, through the pipelines, to the consumers of natural gas as fuel, where it was wasted into the atmosphere at the burner tips. Although helium-bearing natural gas was sometimes purchased for its helium content by the government and private industry before 1960, the helium at that time was generally considered of little or no value, and sellers of helium-bearing natural gas, though aware of the helium content, did not generally negotiate additional compensation for it.[3]

In 1960 Congress decided to establish a conservation program for helium to prevent the waste that was occurring, and to that end enacted the Helium Act Amendments of 1960, 74 Stat. 918, 50 U.S.C. 167 *et seq.* The Amendments authorized the Secretary of the Interior to enter into long-term contracts to have helium extracted from the natural gas stream and then purchased and stored by the government, for subsequent government use or sale to private industry. Accordingly, in 1961 the Secretary entered into contracts with four companies that were engaged in acquiring large quantities of natural gas (the "Helex Companies," of which defendant Phillips is one).[4]

[2] Helium constitutes less than one per cent of the volume of the gas stream extracted from those fields. *Grounds, supra,* 441 F. 2d at 709.

[3] *Grounds, supra,* 441 F. 2d at 721.

[4] The Helex Companies acquired the natural gas from their own production facilities, from pipeline affiliates or subsidiaries who purchased it directly from producers, or from other companies. The gas involved in this case was purchased by Phillips directly from the producer, Ashland, pursuant to long-term, life-of-the-lease sales contracts.

The contracts provided that the Helex Companies would design and build extraction plants, extract "crude helium" (a mixture containing about 70% helium and 30% nitrogen) from the natural gas they had acquired, and sell the crude helium to the government at a price fixed by the contracts.[5] The government then stored the crude helium and intended thereafter to refine it further to 99.9% purity and either use the refined helium for government purposes or sell it to private industry at a price designed to recover the cost of the program.[6]

In its contracts with the Helex Companies, the government agreed that it would pay them, in addition to the fixed contract price for crude helium, any amounts that the Helex Companies might subsequently have to pay to third parties "for the acquisition of helium in the natural gas" in excess of approximately $3.00 per mcf,[7] provided that those payments were with the

[5] Under the contract with Phillips, the government was to pay $10.30 per mcf (1000 cubic feet) of crude helium, subject to variation under certain circumstances.

[6] In fact, none of the helium acquired by the government under these contracts has been refined, used or sold, and it remains in storage today. Sales of helium to the government under these contracts have been terminated since 1973, giving rise to litigation in the Court of Claims between the Helex Companies and the government, which is still pending (Ct. Cl. Nos. 138-75, 248-76, 158-75 and 454-70).

[7] The figure above which the government agreed to indemnify the Helex Companies was a function of the price paid

"consent" of the government. "Consent" was defined to include third-party claims "that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state" (App. D, *infra*, p. 69a, n. 1).

In 1963 and thereafter, when helium had taken on a new value by virtue of the government's program, a number of parties asserted claims with respect to helium extracted and sold to the government under the program. The claims were of two principal kinds. First, landowner-lessors of the natural gas fields asserted claims against their lessee-producers, arguing that the oil and gas leases did not by their terms convey to the lessees the helium portion of the gas taken from the fields and that the lessees had therefore converted the helium. Second, lessee-producers asserted claims against the Helex Companies, arguing that the sales contracts by which the lessee-producers sold the natural gas to Helex Companies (or their affiliates) did not convey the helium portion of the gas.[8] The instant case is a suit of this latter type, brought by Ashland Oil, Inc., a lessee-producer, against Phillips, a

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by the government for crude helium. In the contract with Phillips, the figure is approximately $3.00 per mcf.

[8] Most of the sales contracts were long-term contracts entered into before 1960 and some, including Ashland's contracts with Phillips in this case, dated from before 1954, when this Court held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, that such sales for resale in interstate commerce were subject to the Federal Power Commission's jurisdiction under the Natural Gas Act. Most of the contracts contained provisions for periodic price escalation, arbitration and renegotiation. See *Grounds, supra,* 441 F. 2d at 717.

Helex Company.[9] Ashland filed the suit in 1967 in the federal District Court for the Southern District of Texas, basing jurisdiction on diversity of citizenship.[10] The case was transferred to the District Court for the Northern District of Oklahoma. The government, because of its potential liability under the indemnification provisions of its contracts with Phillips and the other Helex Companies, intervened in most of the helium cases, including this one.[11]

In 1971 in *Northern Natural Gas Company* v. *Grounds*, 441 F. 2d 704, certiorari denied, 404 U.S. 951, 1063, the Tenth Circuit issued a decision in a number of helium cases (not including this one)

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[9] The two Ashland-Phillips contracts involved in this case were made in 1945 and 1953 and provided for sales to Phillips of gas from certain of Ashland's leaseholds for the life of the leases. They established a fixed price for the gas, subject to periodic escalation. The prices established were below the maximum area rate subsequently prescribed by the Federal Power Commission, and the Commission has never restrained the operation of the price clauses of the contracts. The contracts contained no arbitration or renegotiation provisions.

[10] Most of the helium cases were actually instituted by the three Helex Companies other than Phillips, who, seeking to avoid multiple litigation, instituted interpleader actions with respect to a "fund" which consisted of the money paid by the government to the Helex Companies for the helium.

[11] The government also asserted an interest by virtue of its possession in storage facilities of helium to which the various parties were claiming title. The government does not concede that it would in fact be liable to indemnify Phillips or any other Helex Company for any part of judgments entered in this or any other case; it reserves the right to assert any defenses it may have to any claims for indemnity that may be asserted against it.

that were consolidated on appeal.[12] The decision was limited to the liabilities of the various parties. First, the court held that as a matter of state law the mineral leases did convey title to the helium content of the gas and that the lessors therefore had no claim for conversion. Second, the court held that the gas sales contracts similarly conveyed title to the entire gas stream to the Helex Companies. Third, however, the court held that since the gas stream was sold at a price regulated by the Federal Power Commission under the Natural Gas Act, and since Section 11 of the Helium Act Amendments precludes the Commission from exercising jurisdiction over sales of helium,[13] the

[12] The *Grounds* decision involved the interpleader actions brought by the three other Helex Companies. See note 10, *supra*.

[13] Section 11 of the Helium Act Amendments, 50 U.S.C. 167i, provides:

> The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

price at which the gas was sold to the Helex Companies did not include a price for the helium contained in the stream. The court concluded that "the lessee-producers are entitled to the reasonable value of the contained helium" because "satisfactory utility regulation requires [that] result." 441 F. 2d at 722-723. The court therefore remanded the cases to the district court for determination of the value of the helium sold to the Helex Companies and extracted by them for subsequent sale to the government.[14]

While that remand was pending, this Court in *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U.S. 125, decided a jurisdictional issue presented in one of the helium suits. There Texaco, a lessee-producer, sued Phillips, a Helex Company, in federal court, asserting federal-question jurisdiction under 28 U.S.C. 1331(a) on the basis of the Natural Gas Act and the Helium Act Amendments as interpreted by the Tenth Circuit in *Grounds*. This Court, reversing the court of appeals, held that there was no federal-question jurisdiction, stating (415 U.S. at 128-129):

> [T]he federal statutory provisions do not under *Grounds* create a federal right of recovery [for Texaco], but only preclude the interposition of a plea of payment to defeat a quasi-contractual suit for the value of the helium.
>
> Texaco's suit for the reasonable value of the helium is, in effect, an action in *quantum meruit*,

[14] The court also held that the landowners would be entitled under their leases to a royalty on whatever recovery their lessee/producers obtained from the Helex Companies. 441 F. 2d at 723.

> whose source is state law and not federal law. * * * [I]t thus cannot be said that this suit "arises under the Constitution, laws, or treaties of the United States." Accordingly, there is no federal jurisdiction under 28 U.S.C. § 1331(a). [Footnote omitted.]

Following *Grounds*, trials were held in two district courts in the Tenth Circuit to determine the value of the contained helium. The district court in the instant case, employing one method of valuation, arrived at a value for the contained helium at the wellhead of from $11.76 to $16.98 per mcf [15] (App. D, *infra*, pp. 73a-74a). The district court in the other case (dealing with the suits involved in *Grounds*) employed a different valuation method and arrived at a value of the contained helium at the wellhead of from 60 to 70 cents per mcf.[16] The district court in the instant case also decided that federal law governed all issues, so that, among other things, the Texas statute of limitations did not apply to any part of the plaintiff's claims and the plaintiff was entitled to prejudgment interest (App. D, *infra*, pp. 81a, 83a).

A panel of the court of appeals affirmed most aspects of the district court's opinion in the instant case (App. C, *infra*), but the court *en banc* withdrew the opinion and consolidated this case with the appeals

[15] The court accordingly entered judgment against Phillips in the amount of $1,402,800.91, of which $332,574.88 constituted prejudgment interest (App. D, *infra*, p. 74a).

[16] *Northern Natural Gas Co.* v. *Grounds*, 393 F. Supp. 949, 992 (D. Kan.).

from the other district court. However, the court *en banc* then issued an opinion limited to the instant case (App. B, *infra*); the other cases, argued the same day as this one, are still pending before the court *en banc*.

The decision below first reaffirmed, without discussion, the holding of *Grounds* that the producer-seller (Ashland in this case) was entitled to additional compensation for the helium contained in the gas stream sold to the Helex Company (Phillips) because the federal statutes precluded the defense of payment and compelled that result.

Second, the court approved, in principle, the valuation method used by the district court, although it remanded for reconsideration of certain issues involved in the valuation.[17] The court acknowledged that the legally preferred method of valuing helium at the wellhead (*i.e.*, commingled with natural gas)[18] would be to determine the market price of commingled helium on the basis of comparable sales of that commodity (App. B, *infra*, p. 15a). But the court agreed with the district court that the evidence introduced by Phillips and the government concerning comparable sales was inadequate to establish a market price because the sales were too remote in time or place, or because the government allegedly dominated the market by reason of Federal Power Commission regula-

[17] App. B, *infra*, pp. 28a-29a.

[18] Under the rationale of the *Grounds* decision, producers like Ashland are entitled to the reasonable value of helium in its state at the wellhead, that is, commingled with natural gas.

tion and the government's own purchases and sales of helium (App. B, *infra*, pp. 11a-15a). Accordingly, the court affirmed the district court's approach that gave no consideration to comparable sales evidence and relied instead on a "work-back" method, whereby the court started with a supposed market value for pure helium and deducted the costs of extraction, transportation, storage, and a reasonable rate of return (*id.* at 15a-16a).[19]

Third, the court affirmed the district court's reliance on federal law and its resulting rejection of state statutes of limitations and restrictions on prejudgment interest. The court reasoned that this Court's decision in *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U.S. 125, "was concerned only with federal question jurisdiction under 28 U.S.C. § 1331(a), and not whether state or federal law controls" (App. B, *infra*, p. 21a). The court noted the government's intervention in this case, its interest in the outcome by virtue of the indemnity provision in its contract with Phillips, and its "possession of a large part of the helium in question" (App. B, *infra*, p. 22a). The court further noted that the government, in contracting with the Helex Companies and obtaining possession of the helium,

[19] The district court started with a market value for pure helium of $20 per mcf, which was based on the testimony of one of Ashland's witnesses concerning recent sales of pure helium between private parties. The court of appeals, while not disapproving this figure, directed the district court to reexamine the validity of the figure on remand (App. B, *infra*, p. 18a). The district court in the cases still pending in the court of appeals employed primarily a comparable sales method. 393 F. Supp. 949 (D. Kan.).

"was seeking to carry out the Helium Conservation Program then considered of great urgency and importance" (*id.* at 26a), and that the government now bore "the primary liability for the dollars" (*id.* at 23a) with respect to "claims made by a multitude of interest owners from many states relating to production from Kansas, Oklahoma, and Texas," each of which "has somewhat different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases." *Id.* at 22a-23a. In these circumstances, the court held, federal law should govern under the principles of *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, and its progeny (*id.* at 23a).

Judge Doyle dissented, particularly with respect to the court's approval of the work-back method of valuation. In Judge Doyle's view the evidence of comparable sales was adequate to establish a value for commingled helium (App. B, *infra*, pp. 37a-39a), and he observed (*id.* at 33a):

> The fact that the government was the dominant factor in the market should not, we submit, produce a higher price, for it only tends to show that there was no market for the conservation program gas. Stated differently, there was no demand for it. Where that is the situation it usually means that it is not worth much. The only reason that it was worth something to the government was because the government had some interest in conserving it.

Finally, Judge Doyle expressed concern over the impact of this decision on the possible liability of the

Helex Companies and the government in the companion cases, still pending before the court of appeals, which involve claims relating to sales of 36.5 million mcf of crude helium and in which the court, in Judge Doyle's view, is "likely to follow this same [work-back] formula" (App. B, *infra*, p. 39a). As Judge Doyle stated: "If the pattern of the present case continues, there could be additional payment of from \$9.00 to \$12.00 per mcf. It remains to multiply 36,500,000 mcf by the \$9.00 or \$12.00 addition in order to view the dismal news" (*id.* at 42a).

On August 8, 1977, Phillips filed a petition for a writ of certiorari (No. 77-221) to review the decision below.

REASONS FOR GRANTING THE WRIT

This case presents two important issues affecting the substantial interests of the government and many private parties: first, whether federal legislation, specifically the Natural Gas Act and the Helium Act Amendments, deprives purchasers of helium-bearing natural gas of the defense of payment in suits by the sellers for the value of the helium contained in the gas; and second, if the purchasers have no such defense, whether the court below applied correct legal principles in establishing the method by which the helium is to be valued. The ruling of the court of appeals on these issues exposes the Helex Companies, and the government as their indemnitor, to hundreds of millions of dollars of potential liability. The issues are clearly presented in this case, are ripe for decision, and should be reviewed by this Court.

1. The predicate for the liability adjudged by the court of appeals in this and related cases is the holding in *Grounds*, repeated in this case, that federal regulatory policy embodied in the Natural Gas Act and the Helium Act Amendments requires the Helex Companies to pay the lessee-producers additional compensation for a constituent element of the gas which the Helex Companies have already paid for pursuant to freely negotiated contracts. This holding, though discussed in *Phillips Petroleum Co.* v. *Texaco Inc.*, *supra*, has never been reviewed by this Court and is squarely presented by this case. The holding is unsupported by authority or by considerations of federal regulatory policy and is, we submit, erroneous.

It is a basic principle of contract law, whether state law or "federal common law," that when one person buys from another by a freely negotiated contract something that later turns out to be more valuable than the parties anticipated, the buyer gets the benefit and is not required to pay additional compensation to the seller.[20] The rule applies to contracts for the

[20] See 3 Corbin, *Contracts* § 605 (1960). The reason for the rule is obvious: Any other rule would make commercial transactions so uncertain as to impair the free transfer of property. In some contexts, of course, the rule may be different when the buyer has information that he conceals from the seller. See *Securities and Exchange Commission* v. *Texas Gulf Sulfur Co.*, 401 F. 2d 833 (C.A. 2), certiorari denied *sub nom. Coates* v. *Securities and Exchange Commission*, 394 U.S. 976. There is no claim in these cases, however, that at the time the sale contracts were negotiated the purchasers had greater information than the sellers concerning the future value of the helium or the government's future interest in that commodity.

future sale of a commodity at a price fixed by the contract. Here Phillips and Ashland freely entered into gas sales contracts by which, as the court held in *Grounds*, Phillips received full title to the entire gas stream. When the parties entered into these contracts they were both aware of the helium content of the gas stream, and neither party had greater information than the other about the future value of that content.[21]

Nevertheless, the court below, in this case and in *Grounds*, refused to apply the elementary rule. The court explained that the gas sales contracts were subject to rate regulation by the Federal Power Commission, that Section 11 of the Helium Act Amendments [22] precludes Commission jurisdiction over helium sales, and that accordingly "satisfactory utility regulation" requires that the sellers be paid additional compensation for the reasonable value of the helium. 441 F. 2d

[21] That the parties did not anticipate a future increase in the value of the helium provides no basis for rescission or reformation of the contracts. As Corbin states the rule:

> In making this contract of exchange, either party may be mistaken in his estimate of market value, mistaken as to the appetite of others for the commodity. He finds that he can not sell for as much as he paid. Practically never is this such a mistake as will justify rescission. The parties are conscious of the uncertainty of value. Value is one of the principal subjects of agreement. Each party is consciously assuming the risk of error of judgment. As to this, by business custom, by prevailing mores, by social policy, and by existing law, the rule is caveat emptor. It is also, and in equal degree, caveat vendor. [Footnotes omitted.]

3 Corbin, *Contracts* § 605, pp. 638-639 (1960).

[22] See note 13, *supra*.

at 723. The court's conclusion does not follow from its premises and cannot withstand scrutiny.

If the Federal Power Commission had no jurisdiction over the sale of the helium contained in the gas stream, as the court stated, what follows is that the parties were free to negotiate whatever price they desired for the helium content of the stream, without regard to the rate ceilings prescribed by the Commission for the natural gas content. Federal law provides no reason why they should not be governed, so far as the helium is concerned, by their freely negotiated contracts.[23] That the sellers, believing the helium contained in the stream to be of negligible value, did not seek a higher price should not alter the usual rule that the buyer enjoys the increase in value of what he has purchased.

The court in *Grounds* apparently believed its conclusion was compelled by the doctrine of regulatory law that a regulated entity may not deviate from a prescribed rate by providing services or other things of value free of charge as part of the service being regulated. By analogy to railroads providing free warehousing services to favored shippers and the like, the court apparently concluded that the regulated

[23] The court in *Grounds* erred in stating that "[t]he lessee-producers cannot secure any increased value from FPC for the helium content of the gas which they produce and sell." 441 F. 2d at 722. To the extent that they are not otherwise bound by contract, the producers were and are free to negotiate for separate compensation for the helium; the court's statement to the contrary is inconsistent with its holding that the Commission had no jurisdiction over the sale of the helium.

sellers here were deviating from the Federal Power Commission rate by providing the purchasers with free helium along with the natural gas. 441 F. 2d at 720. The analogy was misapplied. If at the time the contracts were negotiated the parties believed the helium contained in the gas had more than negligible value, the authorities cited by the court would indicate that the producers were required to charge a reasonable price for the helium. But Ashland and the other producers did not believe the helium had value, and for that reason failed to obtain or seek a higher price when they contracted to sell their gas. In these circumstances the purposes of the Natural Gas Act—to protect consumers from unreasonable or discriminatory rates—do not require a court to rewrite long-term private contracts that happen to have become more valuable to the purchasers than either party anticipated.

If the Natural Gas Act and the authority it gives the Federal Power Commission could ever affect the rights of buyers and sellers of helium, it would only be in circumstances where the Commission's exercise of jurisdiction interfered with the parties' ability to contract and negotiate freely *with respect to helium*, or altered their contract rights *with respect to helium*. No such circumstances are presented here, or in the companion cases still pending in the Tenth Circuit. Ashland is not claiming that the Natural Gas Act or the Federal Power Commission ever impaired its ability to negotiate and contract freely with respect to the helium portion of the gas stream. Ashland and Phil-

lips freely executed their gas sales contracts in 1945 and 1953. Ashland did not negotiate separately for the helium because Ashland (and Phillips) thought it had little or no value.[24] Neither contract has expired, and the Federal Power Commission has never suspended or interfered with the price clauses of either contract.[25] Ashland does not seek freedom to negotiate with respect to helium, but retroactive release from binding contract terms that were freely negotiated. The lessee-producers in the still pending cases are asserting the same right to retroactive relief.[26]

[24] If anything, the presence of the helium was considered a detriment to Phillips, since it decreased the heating capacity per mcf of the gas stream.

[25] In fact, the contract prices for the gas stream have at all times been below the relevant area rate ceiling established by the Commission.

[26] The court in *Grounds* cited one allegedly "illustrative" example in which Ashland, as seller in another case, invoked the arbitration provisions of its gas sales contract to obtain a new price for the gas sold under the contract. 441 F. 2d at 722. The arbitration provisions specified that the arbitrator was to consider helium as well as the natural gas and other constituents in the gas stream, and the arbitrated price apparently included the arbitrator's valuation of the helium constituent. Ashland then filed for a new rate with the Commission based on the arbitrated price, but neither the Notice of the Rate Change nor the attached arbitrator's decision filed with the Commission made any reference to helium; the only reference to helium was in the definition of "gas" in the attached arbitration agreement. Since the proposed new rate exceeded the Commission's area rate, the Commission suspended the rate in an order that made no reference to helium. FPC Order Providing for Hearing on and Suspension of Proposed Change in Rate, Docket RI67-377 (issued May 3, 1967). That example does not demonstrate that the Federal Power Commission re-

With one possible exception,[27] no producer in those cases has been impeded by the Commission in any effort to negotiate separately with respect to the helium.[28] The court in the decision below and in

fused to permit a seller compensation for its helium, since the helium issue was not presented to the Commission. But even if it did, it would only demonstrate that under the court's holding in *Grounds*, the Commission's action was erroneous and could have been corrected on review. Ashland, however, did not seek review.

[27] See note 26, *supra*. The still pending cases are class actions involving numerous parties and numerous gas sales contracts, which generated a voluminous record at trial. While we cannot certify that in no instance in those cases other than the Ashland episode noted in note 26, *supra*, did the Commission arguably restrain the right of a party to negotiate freely with respect to helium, we are aware of none.

Almost all of the gas sales contracts in those cases, like the Ashland-Phillips contracts here, made no separate reference to helium. A few of those contracts, however, did contain specific provisions for the helium, which permitted the seller to extract the helium but which otherwise expressly waived any claim by the seller with respect to the helium. Those contracts demonstrate that the parties themselves recognized their capacity to negotiate freely for the helium. The *Grounds* decision, that the federal statutes released the sellers from their contracts, made no exception for even those contracts.

[28] Phillips in its petition for certiorari (No. 77-221) states that the issue in *Grounds* "was muddied there because the only contracts the court described had been affected by FPC rate regulation * * *" (Pet. 23). We assume Phillips refers to gas sales contracts which established a contract price for the gas stream that was later reduced because of a lower Commission rate ceiling. It is true that the Ashland-Phillips contracts were not modified in that sense and that some of the contracts in the still pending cases were. But the Commission's modification of a contractual rate for gas in a contract that made no dis-

Grounds erred, therefore, in concluding that Congress by enacting the Natural Gas Act and the Helium Act Amendments had mandated retroactive release from the terms of negotiated contracts.

To the extent that the decision on liability in *Grounds* was motivated by the court's desire to prevent the Helex Companies from reaping a "windfall" from the government's interest in helium (441 F. 2d at 722), the court's concern was misplaced. It was the Helex Companies that entered into contracts with the government, built expensive extraction plants, and assumed the attendant risks. If that activity produced a profit, there is no basis in reason or equity for overturning private contracts and established principles of law in order to give original sellers a share of it.[29]

It is not necessary, however, for this Court to render a definitive decision at this stage of this case on the

tinction between natural gas and commingled helium does not demonstrate that the Commission prevented the parties from contracting separately, without Commission interference, with respect to helium. If a seller failed to negotiate separately for an unregulated commodity that he believed to be valueless, the fact that the price of the regulated commodity may later be changed should not entitle the seller to rewrite the contract with respect to the unregulated commodity.

[29] The judgment of the district court—requiring Phillips to pay Ashland from $11 to $16 per mcf of crude helium when Phillips was paid only $10.30 per mcf—does not share the windfall; it gives all of it, and then some, to Ashland. Under the valuation method adopted by the court below, moreover, most of Ashland's "share" may come not from moneys already paid by the government to the Helex Companies, but from an additional and lavish tap on the federal treasury.

defense asserted by Phillips that by its contract with Ashland it has already paid for the helium content of the gas stream. The court of appeals decided, in this case and *Grounds*, that the federal statutory provisions of the Natural Gas Act and the Helium Act Amendments intervened to override any defense of payment that might otherwise have existed. It would be enough for this Court to rule that this was error—that the federal statutes compel no such result. The case could then be remanded to the court of appeals to determine any remaining issues pertaining to such a defense.

2. The opinions below, both the majority and the dissent, focused mainly on the legal principles to be applied to the valuation of commingled helium. As Judge Doyle indicated, the majority's conclusion on this issue, if applied to the pending cases, would establish a liability on the part of the Helex Companies, and potentially the government, as their indemnitor, in the amount of hundreds of millions of dollars. For this reason, and because the majority's conclusion is erroneous, we believe the issue merits review by this Court.[30]

[30] If the Court accepts our position on the first question presented and reverses the Tenth Circuit's ruling that the federal statutes preclude the defense of payment, it need not reach the valuation issue, which does not come into play unless there is liability to pay additional compensation for the helium. But if the court below or any court in any helium case should find such liability to exist under a particular lease or contract on principles unrelated to the federal statutes, the valuation issue would then be presented. Since it was fully discussed and

Primarily for the reasons stated by Judge Doyle, we submit that the court's decision on the valuation issue was wrong. As Judge Doyle pointed out, the value of the helium involved in this litigation was a value created by the government. Before Congress in 1960 concluded that it wished to conserve helium and authorized the Secretary of the Interior to enter into contracts to have helium extracted from natural gas and purchased and stored by the government, commingled helium at the wellhead had little or no value. With a few exceptions, it was not being sold, but wasted. The government, through its contracts with the Helex Companies, constituted itself a market for the helium and gave it a value. Yet the valuation method approved by the court below would have the effect of requiring Phillips to pay Ashland considerably more for the helium than Phillips received for it from the government, in a situation where the government was the principal buyer in the market. Such a result affronts ordinary concepts of value, produces a windfall for Ashland, and by virtue of the indemnity agreements could impose a heavy penalty on the government.

We submit that the law applicable to the valuation of the helium in this case would be federal law.[31]

decided by the court of appeals here, the Court may wish to address it at this time in order to move the helium litigation more swiftly toward a conclusion.

[31] This Court's decision in *Phillips Petroleum Co.* v. *Texaco Inc., supra*, is not to the contrary. In holding that "Texaco's suit for the reasonable value of the helium is, in effect, an ac-

Phillips, in its petition, takes a contrary view and argues that the court of appeals, by applying federal

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tion in *quantum meruit,* whose source is state law and not federal law" (415 U.S. at 129), and that the claim therefore did not "arise under" the Constitution or laws of the United States for the purposes of federal-question jurisdiction under 28 U.S.C. 1331(a) (*ibid.*), the Court did not establish that state law governs all issues in the case. Thus, in *Miree* v. *DeKalb County,* No. 76-607, decided June 21, 1977, which was also a contract suit arising under state law, the Court considered on its merits the question whether federal law or state law governed interpretation of the federal contract involved in the case; it did not regard that question as concluded by the source of the plaintiff's claim. While the Court decided in *Miree* that state law controlled, the considerations it relied on point the opposite way here. There is here a "question regarding the liability of the United States or the responsibilities of the United States under the contract" (*Miree, supra,* slip op. 4), and the resolution of Ashland's claim against Phillips here may have a substantial "effect upon the United States or its Treasury" (*id.* at 5). It is not true here that "the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome" (*id.* at 6), or that "any federal interest in the outcome * * * 'is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern'" (*id.* at 8, quoting *Bank of America* v. *Parnell,* 352 U.S. 29, 33-34). See also *United States* v. *Little Lake Misere Land Co.,* 412 U.S. 580, 592-593. In addition, as the court below noted, there is a need for interstate uniformity in judicial handling of the massive helium litigation (App. B, *infra,* p. 23a). The valuation of the helium, in particular, is an issue that substantially implicates federal statutes, the federal helium conservation program, the federal contracts with the Helex Companies, and possibly the federal regulation of natural gas, as well as the federal government's substantial potential stake in this litigation. We do think the court may have erred in failing to "adopt" state law with respect to certain issues in the case, such as the statute of limitations. See *Johnson* v. *Railway Express Agency,* 421 U.S. 454.

law to the case, contravened this Court's decision in *Phillips Petroleum Co.* v. *Texaco Inc.* We agree that the choice between federal and state law in this case presents an important question that may merit this Court's review, though we do not agree that the court below decided it erroneously.

3. The decision below warrants this Court's review even though similar cases, involving far larger claims, are still pending before the court below and even though the court in this case remanded for further consideration of certain subsidiary issues. The underlying issue of liability and the valuation issues are common to all the cases, are unlikely to be decided differently in the pending cases, and are clearly presented by the record in this case (more clearly, and with fewer factual complications, than in the still pending cases). Now or later, those issues merit this Court's review. The helium litigation involves hundreds of parties and is already fourteen years old. To defer this Court's review of the controlling issues until further proceedings have been held on remand, where those proceedings would be based on important conclusions of law that are, we submit, erroneous, would subject the parties and the courts below to substantial and unnecessary burdens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCH TERM—May 10, 1977

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Circuit Judge,
The Honorable Oliver Seth, Circuit Judge,
The Honorable Robert H. McWilliams, Circuit Judge,
The Honorable James E. Barrett, Circuit Judge, and
The Honorable William E. Doyle, Circuit Judge

No. 73-1797

No. 73-1798

No. 73-1799

(D.C. No. 67-C-238)

ASHLAND OIL, INC., PLAINTIFF-APPELLEE and CROSS-APPELLANT

vs.

PHILLIPS PETROLEUM COMPANY, DEFENDANT-APPELLANT

vs.

UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

JUDGMENT

This cause came on to be heard en banc on the consolidated record on appeal from the United States District Court for the Northern District of Oklahoma and was argued by counsel and submitted to the Court.

Upon consideration whereof, it is the judgment of this Court that the judgment of the district court is affirmed in part and reversed in part as more fully set forth in this Court's opinion. The cause is remanded to the United States District Court for the Northern District of Oklahoma for further proceedings in light of the opinion of this Court. Each party shall bear its own costs.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

/s/ Linda A. Hall
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

Nos. 73-1797, 73-1798, 73-1799

ASHLAND OIL, INC., APPELLEE, CROSS-APPELLANT

v.

PHILLIPS PETROLEUM COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

Appeal From The United States District Court For The Northern District of Oklahoma

(D.C. #67-C-238)

(FILED MAY 10, 1977)

ON REHEARING EN BANC

Richard B. McDermott, Tulsa, Oklahoma (Lloyd G. Minter and Don L. Jemison, Bartlesville, Oklahoma, with him on the Brief), for Appellant, Phillips Petroleum Company.

Gerald Sawatzky, Wichita, Kansas (Jay W. Elston, Houston, Texas, John M. Imel, Tulsa, Oklahoma, Arloe W. Mayne, Ashland, Kentucky, W. O. Strong

III, Houston, Texas, and Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, Fulbright, & Jaworski, Houston, Texas, and Martin, Logan, Moyers, Martin & Conway, Tulsa, Oklahoma, of Counsel, with him on the Brief) for Appellee-Ashland Oil, Inc.

Floyd L. France, Attorney, Department of Justice, Washington, D.C. (Peter R. Taft, Assistant Attorney General, Nathan G. Graham, United States Attorney, Hubert A. Marlow, Assistant United States Attorney, E. Edward Johnson, United States Attorney, Jon K. Sargent, Assistant United States Attorney, Edmund B. Clark, Dennis A. Dutterer, George R. Hyde, and Jacques B. Gelin, Attorneys, Department of Justice, with him on the Brief), for Intervenor-Appellant, United States of America.

Before LEWIS, Chief Judge, BREITENSTEIN, SETH, MCWILLIAMS, BARRETT and DOYLE, Circuit Judges, sitting en banc.

SETH, Circuit Judge.

DOYLE, Circuit Judge, dissents. Dissenting opinion attached.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted therefrom and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court, and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity, and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in the several opinions hereinafter cited. It is, however, necessary to describe the contractual relationship which existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. §§ 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability of the Bureau to then ascertain the

identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

We are here concerned with the Government contract with defendant Phillips whereby the helium was physically acquired by the Government, but the ownership and compensation problems were put off to another day. The Bureau thus used by this contract the advantageous position of one in possession; postponed the inevitable legal problems, and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as compensation to defendant. The record shows that this figure was arrived at by comparison of the estimated costs to the Government had it built its own plant. No relationship of this figure to any then market values was developed in the record. This was a base price of $10.30 per Mcf and was subject to escalation under Paragraph 7.3. Paragraph 7.4 provided that in ad-

dition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . or parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein." It provided that such payments to qualify would have to be made with the consent of the buyer, and that "consent" included claims that ". . . have been judicially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the contract formula the defendants would pay the first $3.00 per Mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States, with the United States providing an indemnification for required payments above the stated amount. There are other qualifications also.

It is obvious that this litigation wherein compensation is demanded by the interest owners of the helium was contemplated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part decided in the *Consolidated Helium Cases (Northern Natural Gas Co.* v. *Grounds*,

411 F.2d 704 (10th Cir.)), opinion by Judge Breitenstein. The basic legal relationships among the landowners, producers, and gas purchasers were there established, as was the relationship of the Natural Gas Act and the Helium Act. The controlling rules were set in the *Grounds* opinion, en banc consideration was denied, and the Supreme Court denied certiorari. We decline to reconsider *Grounds*. Further, in *Grounds* we held that ". . . the lessee-producers are entitled to the reasonable value of the contained helium." The problm of the amount of reasonable compensation, and who should pay, was not decided in Grounds, and was remanded to the trial court. The *Grounds* case is again before this court en banc and was consolidated for hearing with this case, but is not considered in this opinion.

When the matter of compensation is in issue we are faced with a somewhat different aspect of the physical and legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract arrangement are all still important, but the relationship of the contracting parties to those who now have been determined to own interests in the helium, and, of course, the value of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United States" attached. This motion was granted. The Complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, cited 28 U.S.C. § 2201, and recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking the "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium in turn sold to the United States under the contract referred to above. The Government further alleges that Ashland has already been paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal." The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnify Phillips for additional payments . . . ." The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint. Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be changed to Ashland Oil and Refining Company, Plaintiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, objected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought by Ashland against the defendant Phillips to recover the reasonable *wellhead value of helium commingled with the FPC jurisdictional Gas*, but separated at defendant's plants constructed pursuant to the Helium Act and delivered as "conservation helium" to the Bureau of Mines. The suit was tried within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases, or Grounds*).

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds*, there considered and rejected. It would serve no purpose to again consider these arguments. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

It must be accepted that the "value" sought to be determined in this suit is basically a factual matter determined through the application of the appropriate legal doctrines. This is the value at the wellhead of the helium commingled with the natural gas there being produced.

The appellants here urge as a basic error by the trial court that it chose the wrong method in arriving at this "value." The trial court determined that there was no prevailing market value for the commingled helium, there was no free competitive market for this helium at the wellhead. The court thus used a market value for the ultimate product less the cost of beneficiation of the helium-bearing gas. The defendants urge that the trial court had sufficient evidence before it of a "market value" of the commingled helium at the wellhead.

The defendants, on their "market value" theory, put on testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component. These described events covered a broad time span and a wide geographical distribution. They involved both governmental agencies and private parties.

The trial court, in holding that there was no free competitive market, held that these transactions were of no probative value because they were not comparable. It thus concluded that the evidence failed to establish a "market price" by comparable sales. We reach the same conclusion. The transactions described by the witnesses for the defendant were too

remote in time or place, and otherwise could not be considered as comparable. The testimony did not show a free market condition to establish a usable price. It is apparent that the gas stream here concerned with all its components was directed by the FPC, and was locked in by the jurisdictional gas. There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases. The helium thus had to go along with the stream. The purchasers of the stream here concerned, of course, took the position that they owned the entire contents, and were not required to pay anything more. This litigation demonstrates the character of the market, the Government domination of the market, and the strength of bare possession.

In the market price evidence of the defendant, considerable detail is presented as to purchases at the several Government helium plants. These include the plants at Exell, Otis, Cunningham, and Navajo. The helium purchases or gas purchases at these plants were made during World War II. The years which have passed since "The War" would seem to cast more than a doubt that these could possibly be comparable sales. The purchases at the Navajo plant were renegotiated after the War in 1955 and 1959, but again this cannot be a comparable transaction. The stream from the Rattlesnake production had no use as a fuel. It did have a high helium content, but nothing is developed as to any other market for this gas. The Government had for all practical purposes a monopoly on sales of helium until about 1962.

There was also testimony as to purchases of gas by the Government for the Keyes plant in 1958. The price was somewhere near $2.00 per Mcf. The production costs at this plant were about $15.50 per Mcf. The basic interest of the seller was to make the residue gas marketable by raising the BTU. The seller also assumed liability for possible additional payments to third parties.

The Otis plant was also used to upgrade the gas for fuel purposes by separating out the noncombustible portions of the stream.

Phillips also introduced evidence as to several *contracts* it had made for the payment for components of the gas production purchased. Some mentioned helium, some did not. This was a dollar price in some, and a formula as for all other conponents in others. These are not of particular significance, especially the casing head gas contracts, because there was no evidence that the casinghead gas contained helium nor was ever processed for helium. As to the other Phillips contracts, there was no showing that the gas had a helium content at all (with insignificant exceptions), nor that there was ever a remote possibility of extraction, again with insignificant exceptions. Contractual provisions in such a context, even where helium was mentioned, are a meaningless gesture of the parties, and cannot be considered as evidence of comparable *sales*.

The Gas Sales Agreement between Colorado Interstate and Alamo Chemical Company (a Phillips affiliate or subsidiary) was put in evidence. This pro-

vided for the processing of gas produced in Morton County, Kansas, for the removal of helium and liquefiable hydrocarbons. The plant operator was to pay $2.00 per Mcf for helium extracted at the plant. This price was not negotiated, and it seems reasonable to assume that this was because there was litigation pending as to the obligations to pay for helium involving the parties. The contract limited the sellers' liability on the title warranty of helium to $2.00 per Mcf. There was no contract provision for payment for hydrocarbons removed. This contract must be considered for all practical purposes as a post-litigation contract. There was also in evidence a gas exchange agreement between Phillips and Pioneer Natural Gas Company. This had a price for helium but there were other contractual considerations such as delivery of gas at other locations, and payment for only part of the helium. This agreement cannot be considered as a comparable sale.

The testimony of the defendants and evidence was thus directed to "other sales" in other places and other times. There was no substantial showing that these were "comparable sales." Evidence of "other sales" falls far short of establishing a market without comparability being clearly established.

In addition to the evidence relating to particular contract provisions, and some sales, there was expert testimony. The plaintiffs and defendants had expert witnesses who testified as to what the value of helium should be. This testimony produced by both sides is of theoretical interest, presents a facet of the

entire conservation program, and a description of the few independent private enterprises which tried to enter the field. No matter how interesting, this evidence is only opinion evidence, and does not establish facts. This testimony comes well down on the scale of acceptable evidence as to value. It is obvious that comparable sales or current market price is the best, and second would come the work-back method. The expert testimony of the type here presented would come somewhere after that. The experts were extremely capable, experienced persons who gave well considered and conscientious expression of their opinions, but nevertheless it remained opinion evidence of a matter of objective facts.

We thus must agree that the trial court was correct in seeking an alternative method to "market price" for establishing the reasonable value of the helium component at the wellhead. It is obvious that the comparable sales-current market price is by far the preferable method when it can be used. However, it cannot be used when the elements necessary for its proper application are lacking. The trial court thus had to resort to a work-back method or price less costs of benefication. This was a less desirable method but perfectly valid. Under this method a point was selected where there can be determined an established price and the cost of processing or benefication were deducted to move back to the place where the value must be established.

The work-back valuation is well recognized in the production and early processing of natural gas. It is

commonly used, according to the record, in placing a value on feed stock for gasoline plants and related processing. There is nothing unusual about the method, it is subject to proof, and can be just as accurate as any other method, but it is more difficult to apply. There is here concerned a single plant constructed and operated for the specific purpose of extracting helium. Other costs, and other elements, can be established. This work-back method was used by the Government and the Court of Claims in making payment to the Navajos for gas supplied to the Navajo Helium Plant. *See Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct.Cls.). The Government has used it on other occasions such as for Kerr-McGee royalty payment in Arizona, and under different circumstances. As to the work-back as a method for valuation, *see also* Brown, Law of Oil and Gas Leases, § 6.09; *Harding* v. *Cameron*, 220 F.Supp. 466 (W.D.Okl.); and Sneed, 25 Tax L. Rev. 641. This method to establish value has not only been used in the petroleum industry, but also in other natural resources cases. *See United States* v. *Wyoming*, 331 U.S. 40; *Black Crystal Coal Co.* v. *Garland Coal & Mining Co.*, 267 F.2d 569 (10th Cir.); and *Greer* v. *Stanolind Oil & Gas Co.*, 200 F.2d 920 (10th Cir.). *See also* the gasoline plant case, *Freeland* v. *Sun Oil Co.*, 277 F.2d 154 (5th Cir.), which is a common use in the industry.

Phillips argues that its right to acquire the helium component was covered by its contracts, and neither the Helium Act nor the Natural Gas Act altered these contracts. Thus there was a Fifth Amendment violation if its property was "given" to another. This court on the *Grounds* case really decided this issue and there would seem to be no need to consider it again other than to state that Phillips acquired the whole stream or production, but has only paid for part. We said in *Grounds*, "In our opinion private contract law and the principles applicable thereto are not controlling." Apparently the Government has yet to pay Phillips for much of it also.

The appellant next argues that the value less expense method was not only inapplicable, but it was improperly applied in that the proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the several factors or elements of the method of valuation.

As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no substantial contrary evidence presented at trial although on appeal appellants assert deficiencies in the method. This element however was not adequately developed by the proof and further hearing is required on this element.

The appellants also object to the allowance made by the trial court of \$2.00 per Mcf for the "treatment" of the "crude" helium sold to it by Phillips (to be incurred by the Government before resale), as in-

sufficient in that it did not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The use of the deduction was proper and appellants have not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the starting figure or element of the value less expense method. This figure was testified to by the witness for the plaintiffs; this price issue was not met by defendant by way of proof. On remand the validity of this figure must be examined by the trial court, and a determination made again as to the proper starting value.

The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program—The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point, and *United States* v. *Fuller*, 409 U.S. 488, which in turn cited *United States* v. *Cors*, 337 U.S. 325. This again concerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. It was a stockpiling of a commercial product. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court allocated part of the plant expense to these liquids as by-products. The evidence is unclear that an increase in the production of liquids would result from the helium plant operation over what had been experienced before and over ordinary extraction plants. Appellants maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extractions. The record shows that increased quantities of wet gas were directed to at least one of the plants, and this could make a difference in the production of liquids, but no figures were produced by defendants. Under this state of the record, we must hold that the trial court did not have adequate data to this element. Different quantities of liquids were produced at different plants, and this may result in different helium values at different plants. In view of the evidence, this was a consequence of the application of the expense element in the formula. However, further evidence on this aspect is needed.

The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base figure for the helium-nitrogen mixture it was buying from Phillips under its contract. This may be a consequence of the decision, but there is no reason why the wellhead price should be determined by the contract price. This payment was not necessarily the "price" of the helium as other considerations were present. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences of the transaction including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. The Government agreed basically to pay Phillips for its interest in the helium and then to pay more if other interest owners established their claims. This has been done, but the price "paid" for all the interests in the helium has not yet been determined. The value here sought to be established is independent of the contract base amount, and is to be of all interests of the proper parties.

We have considered *Lippert* v. *Angle*, 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof with which we agree, but the case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also Greenshields* v. *Warren Petroleum Corp.*, 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal question case, relying on our opinion in *Texaco Inc.* v. *Phillips Petroleum Co.*, 481 F.2d 70 (10th Cir.), which was thereafter reversed by the Supreme Court in *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U.S. 125. That case was concerned only with federal question jurisdiction under 28 U.S.C. § 1331(a), and not whether state or federal law controls. The United States was not there a party. Federal jurisdiction is here conceded.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit, and the Government has asserted a claim or an interest. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all important issues. No relief was sought by Ashland directly against the United States. The trial court found the elements of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was considered in the *Consolidated Helium Cases*, and the arguments were rejected.

As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as

a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is apparent that under the contractual arrangement, the United States undertook to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natural gas above a certain figure. This is in the nature of an indemnity agreement and the contract contains qualifications and limitations not here concerned. The United States is liable for some of the additional amounts which Phillips will have to pay. The Government has thus entered the litigation to assert its own position and interest under the contract. This is initially a matter of dollars, but the Government still has possession of a large part of the helium in question, and this possession can put a somewhat different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie* v. *Tompkins*. This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704 (10th Cir.), and by the record here, the Government in the several cases before this court is faced with claims

made by a multitude of interest owners from many states relating to production from Kansas, Oklahoma, and Texas. Each state has somewhat different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. *Tompkins* does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government check, and a delay in notice by the Government to the bank beyond the period contem-

plated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the laws of any state. In the matter before us, the helium was acquired by the United States by contracts as authorized by federal statutes. This contracting with private enterprise was suggested by statute. As stated by the Court in the cited case, "The desirability of a uniform rule is plain." *See also National Metropolitan Bank* v. *United States*, 323 U.S. 454, limited by *Bank of America* v. *Parnell*, 352 U.S. 29. The War Bond cases in state and federal courts lead to the same result. *See In re Stanley's Estate*, 80 P.2d 332 (Colo.). The Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, also indicated a considerable area to be excluded from the application of *Erie*. There an action by the FDIC was brought on a note given to a bank by the defendant, and the Court applied federal law. Also in the shareholders' liability action in *Holmberg* v. *Armbrecht*, 327 U.S. 392, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv.L.Rev. 976, and 105 U.Pa.L.Rev. 797.

Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied. The federal courts can adopt

a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366. *See also United States* v. *Allegheny County*, 322 U.S. 174. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In *United States* v. *Standard Oil Co.*, 332 U.S. 301, the Court stated that the interests of the Government and its legal relationships may be so determined. The impact of the application of state law upon the governmental interests is a factor of great weight. *See United States* v. *Mitchell*, 403 U.S. 190.

The Court in *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, considered the application of a Louisiana statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a "choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that purpose.'" [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States* v. *Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests, and said: "The choice

of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was efficient and effective. In so doing it set up the contractual barriers between itself and the landowners and gas producers, and also put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and looking at the substance, the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the *Clearfield* doctrine, the trial court was correct in not applying *Erie* v. *Tompkins*.

We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This determination prevails. The trial court, as to the interest of the landowners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the

lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

The issue of limitations had been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitation have come into play. *See deHaas* v. *Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir.). We must conclude that this action has not been barred. *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538.

The trial court acted within its discretion under federal law in the allowance of prejudgment interest. *Royal Indemnity Co.* v. *United States*, 313 U.S. 289; *St. Paul Mercury Indemnity Co.* v. *United States*, 201 F.2d 57 (10th Cir.).

As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, a Miller Act case. The opinion includes a direct and intensive consideration of attorney fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.'"

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co. See also Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240.

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the value of the helium, as above indicated. The judgment is also set aside as to the valuation determination with direction to hear further the matters or elements of the work-back method, referred to above, wherein there was insufficient evidence in the record.

Thus some elements have been considered in this opinion and ruled on.

On remand the trial court shall also consider whatever other elements that may be developed at further hearing, in making the value less expense or work-back determination.

Thus, we affirm the use of the work-back method of determining value and the use therein of the $2.00 figure for treatment of crude helium. We set aside

the values which the trial court determined by the use of the work-back method. On remand the trial court shall give further consideration to, and receive such evidence as may be admissible bearing on, (1) the proper starting value, (2) the amount chargeable to return on investment, (3) the expense properly allocable to production of hydrocarbons, and (4) such other matters, as are pertinent and not foreclosed herein, that bear on the determination of value by the work-back method.

We affirm the decision of the trial court that the action is not barred by any statute of limitation and that prejudgment interest may be allowed. We reverse those portions of the judgment that (1) allow attorneys' fees and (2) divide the recovery equally between the lessors and the lessees. The lessors may recover only the amounts determined by the royalty provisions of their leases.

AFFIRMED IN PART, REVERSED IN PART, and remanded for further proceedings in the light of this opinion. Each party shall bear its own costs.

DOYLE, Circuit Judge, dissenting.

I respectfully disagree with the result of the majority opinion and, particularly, that part of it which affirms the trial court's use of the work-back theory or approach in determining a reasonable value for the commingled helium at the wellhead. My disagreement stems from the following: the work-back approach is not the preferred way to determine market value of a commodity; the starting point for determining value is wrong; and the result of its application here is an excessively high price to the government.

Both the government and Phillips Petroleum favor the comparable sales plus expert testimony method; this is the view that I prefer.

I.

WHETHER THE UNITED STATES CONTEMPLATED, AS THE MAJORITY MAINTAINS, THE PAYING OF A SUBSTANTIAL AMOUNT AT A SUBSEQUENT TIME TO LESSEE-PRODUCERS AND LANDOWNERS

I must disagree with the conclusion in the majority opinion that it was within the contemplation of the contracting parties that there would be a large amount paid to interest owners of the commingled helium at some future time. My reasons are as follows:

The Bureau of Mines had entered into contracts for the purchase of extracted helium with four companies, including Phillips, who had possession of the natural gas stream. By so doing the government avoided the necessity for identifying and dealing with all possible interest owners of the helium.

It is true that paragraph 7.4 of the contract with Phillips provided for the partial indemnification of Phillips by the United States for amounts paid subsequent to the date of the contract for the acquisition of helium in the natural gas or for any interest therein. But to raise the obligation of indemnification, the United States had to consent to the payments or the payments must have been judicially determined or they must have been made in accordance with guidelines established in judicial proceedings. In the Phillips contract indemnification came into being only after Phillips paid in excess of about $3.00 per mcf to third parties for interests in the helium.

The point that is here made is that although the government might have been aware of some indemnification possibility, it did not contemplate the kind of payments that would be necessary if the work-back method were to be followed in both the Ashland and the Helex cases.

The findings of the trial court do not support the statement in the majority opinion that it was contemplated by Phillips and the United States that there would ultimately be substantial compensation paid to the interest owners. Memoranda written by the Associate Solicitor of the Division of Mineral Resources, Department of the Interior, and by the chief helium contract negotiator for the Bureau of Mines mentioned the possibility of increased contract prices if the government required the extraction companies to give a warranty of title without some government indemnification for helium payments. But there is no

evidence that the original amounts to be paid were simply a down payment. There was no prior experience of paying large sums of money for this helium. Mr. Wheeler of the Bureau of Mines testified that in building the cost model to arrive at a government negotiation position, a \$2.00 per mcf amount for the commingled helium had been used because that amount reflected the government's experience in obtaining a supply of helium-bearing gas. It had never paid more than \$3.00 per mcf.

The \$3.00 per mcf indemnification level was not an arbitrary figure. It represented a ceiling above actual payments on previous occasions. It was an estimation of the probable maximum price that might be paid. Therefore, it is not an established fact that here would be payments in excess of \$3.00 per mcf as the majority assumes. Even if some excess above \$3.00 per mcf was in the minds of the negotiators of the contracts, it was not any great amount. For example, there is no evidence that it was contemplated that the price would go to \$10.30. There was no evidence of a belief that it would exceed \$2.00 to \$3.00. If it was thought that the \$2.00 to \$3.00 was just the beginning, it seems likely that the extraction companies would have not left the remaining amounts up to \$10.00 to \$14.00 to chance. Their contemplation would in some way have been expressed.

II.

Whether the Evidence of Comparable Sales Was, As the Majority Maintains, So Lacking in Probative Value As to Require That It Be Disregarded

The reasons which the majority opinion gives for rejecting evidence of comparable sales for the purpose of establishing reasonable value include, first, that the transactions described by the witnesses which showed comparable transactions or sales were said to be too remote in time or place. The opinion goes on to say that the testimony did not show a free market condition capable of establishing a usable price.

Secondly, it is said that the helium was part of the gas stream and that this was subject to regulation by the FPC and that this also restricted the opportunities for renegotiation of sales or the negotiation "with new purchases."

The fact that the government was the dominant factor in the market should not, we submit, produce a higher price, for it only tends to show that there was no market for the conservation program gas. Stated differently, there was no demand for it. Where that is the situation it usually means that it is not worth much. The only reason that it was worth something to the government was because the government had some interest in conserving it. It had some defense projects and space projects in which it might be used and also there is belief by some that in the future it might be of some value in creating an atmosphere

for the performance of special tasks. If, as the opinion states, there is neither demand nor market for this, it would seem reasonable to adopt a pricing policy which gives to the lessee-producers such as Ashland actual cost plus a reasonable profit.

My objection to the work-back method is in its artificiality. Interestingly, it fails to start with real cost figures—its beginning is with opinion evidence given by Mr. Garwin, who was employed as manager of the Kerr-McGee plant. He testified on behalf of Ashland. His opinions were based on the price of *pure* helium sold by the government and private companies. He referred to present sales of pure helium on the private market as being $20.00. The government had charged $35.00 not because this represented a fair price. Rather, the government had no choice since it was required by law to charge that amount. The majority apparently has questions about the validity of the $20.00 starting point. It does not give a reason for its dissatisfaction. My objection is its gross excessiveness and its lack of reality.

Moving backward from a $20.00 price for pure helium to the cost of the gas purchased by the government which was not pure helium but was composed of about 50 percent helium and 50 percent nitrogen, deductions for the cost of extracting helium were made. The end result are prices ranging from $11.76 to $16.98 per mcf for the years 1963-71. The government has already paid to Phillips $10.30 per mcf which includes the cost to Phillips of building an extraction plant. Inasmuch as the government is obligated to indemnify Phillips for all sums exceeding $3.00, this means that the difference between the $11.76 to $16.98 figures and the $3.00 indemnification threshold will in all probability be paid in addition by the government.

The trial court and the majority opinion here made no effort to isolate a rule or procedure to ascertain actual market value either from the standpoint of comparable sales or original cost or reproduction cost. It gave its full and exclusive blessing to the work-back theory. The legal objection to this is its secondary evidentiary character. It is secondary because it is called into use only if it is impossible to ascertain actual market value, from comparable sales, for example. It would have been valid to have used it for comparison purposes, that is to test and to compare the validity of the price arrived at by some other more accepted method, but this has not been done. We find them embracing it wholly and completely. This was not justifiable since there was evidence of comparable sales either at the wellhead or at the inlet of the plant.

It is more specifically objectionable because of the $20.00 starting point. If they were going to select a stage in the process and deduct costs in order to arrive at the selling price at the wellhead or at the plant inlet, they should not have started with a product which has nothing whatever to do with this case, that is they should not have attempted to discover a price for pure helium. Instead they should have looked to prices of conservation helium gas with 50 percent

helium content and the remainder nitrogen, for this is the product that is sold to the government. The beauty of starting with crude conservation helium is that they had a demonstrable sale in front of them and that is the sale from Phillips to the government for the sum of $10.30 for conservation helium. From this point it would only have been necessary to deduct the costs of extraction and of transportation from the wellhead to the extraction plant. Had they done this they would have come up with a price close to $3.00. It could be more or less. For comparison purposes they could look at the actual sales at the wellhead or at the plant inlet and this would have given them a true picture. It is worthy of note that this is exactly what Judge Brown did in the Helex cases, and his result is realistic and reliable. Judge Brown, needless to say, did not accept the work-back theory as an exclusive formula.

In the cases which have used the work-back method, I find that in each instance the court started out with a clearly supported market price and not a contrived one—a price well established in a real market for the specific commodity to be valued—or with proceeds from the actual sale of the commodity at some later point in its processing. *See Freeland* v. *Sun Oil Company*, 277 F.2d 154 (5th Cir. 1960); *Black Crystal Coal Co.* v. *Garland Coal and Mining Co.*, 267 F.2d 569 (10th Cir. 1959); *Greer* v. *Stanolind Oil and Gas Co.*, 200 F.2d 920 (10th Cir. 1952). *See also Stafos* v. *Missouri Pacific Railroad Co.*, 367 F.2d 314 (1966).

This court in *United States* v. *Sowards*, 370 F.2d 87, 91 (1966), showed that no one method need be exclusive unless it clearly establishes the price. It pointed out that the federal concept of market value is closely related to selling price on the market and that the best evidence is comparable sales even though the determination is not limited to that method. It approved the use of other data where there are no comparable sales and noted that in condemnation cases market value may also be based upon reproduction costs or capitalization of net income or an interaction of these methods together with comparable sales. It said that all of this must look to what a willing seller would sell for and a willing buyer would pay. The *Soward* decision nevertheless showed a preference for comparable sales. On the other hand, the work-back method is to be resorted to only where everything else fails.

In summary, then, it was wrong to adopt the work-back method as an exclusive one. It was wrong to start at the point where the trial court started and, of course, the result is an untenable one because it unnecessarily produces an excessive price.

What about the comparable sales which the majority opinion condemns?

We must bear in mind that the contracts entered into by the government looked to prices in 1961. The Keyes plant was cited for example and this involved purchases of gas by the government in 1958 at prices approximating $2.00 per mcf at the extraction plant inlet. The production costs were about $15.50 per

mcf, but the basic interest of the seller was to make residue gas marketable by raising the BTU. This was the approach that was used in the Otis plant also. It was seeking to upgrade gas for fuel purposes.

I would submit that the fact that there was this kind of motivation does not outlaw the comparable sales evidence. Removal of helium as an aid to the heating quality of the gas ought not to render the evidence of the sale noncogent.

The purchases of the government plants at Navajo, Exell, Otis and Cunningham are said to be out of time because they occurred in 1945 during the War. They are hardly more remote from 1961 than are the sales cited by Mr. Garwin, that is the $20.00 sales which occurred in relatively recent times. There were also purchases of helium-bearing gas for the Navajo plant in 1955, 1959, and 1962; all at about $2.00 per mcf for helium content at the plant inlet.

The gas sales agreement between Colorado Interstate and Alamo Chemical Company, a Phillips affiliate, which were at $2.00 per mcf does not appear to be out of line. The 1945 Navajo sales just referred to were determined by the Court of Claims to have a value of $2.99 per mcf. The fact that they occurred in 1945 could be taken into account, but this is a two-edged sword because there was some actual demand for this gas during the World War II period.

I am not saying that the comparable sales should be accepted as gospel. This does not mean, however, that we should bury our heads in the sand to them. We can at least view them without fear of being con-

taminated. The probative value of actual sales is that they provide a more rational and realistic view of value than does some theoretical approach such as the work-back approach because these are actual demonstrations. The majority opinion does not tell us where the social or other value is in the work-back theory. As suggested before, it might be palatable if actual cost figures were used in arriving at a starting point. It is, however, lacking in palatability when the opinion of the chief witness for Ashland that $20.00 is a fair price for pure helium is accepted completely as the starting point for a work-back process.

The foregoing is important because we are dealing not with $100,000 or even a few million. Ultimately if the work-back formula is used this could mean—and we consider not only this case but its companion, the Helex II cases which have yet to be handed down but which are likely to follow this same formula—hundreds of millions of additional dollars to be paid by the government for a commodity which at best has an uncertain value now and which does not promise to have any added value in the future.

III.

Whether Today's Decision Will Result in the Government's Being Compelled to Pay an Unreasonably High Price, an Amount Which Is Beyond the Market Value of the Helium Gas

What would be the effect if the work-back method were applied to the *Helex II* cases?

Most of the helium in the United States occurs in Kansas, Oklahoma and Texas. It is not surprising, therefore, that the companion case to this present one, the so-called *Helex II* cases, arose in Kansas. The enormity of the occurrence was probably responsible for the helium conservation program in the beginning. These Kansas cases have been before this court previously. They were filed in 1964. The first one was decided at trial in 1968. It is reported in 292 F. Supp. 619. That decision was reviewed by this court in 1971. *Northern Natural Gas Co.* v. *Grounds*, 441 F.2d 704. This initial case was primarily concerned with title to the helium. Following remand, trial was had in order to determine value. As in the instant case, the government had already paid a substantial amount, about $12.00 per mcf, which purported to represent the cost of the extraction plants as well as the cost of the helium. The action was in interpleader. Its purpose was to determine the value of the helium and hence the obligation, if any, of the government or a party to pay additional amounts. At the trial evidence of comparable sales was not similar to the evidence offered at the *Ashland* case. There was a difference. A good deal of opinion and interpretative evidence was offered on behalf of the government. In sum, the government presented a real case in this instance—a much stronger case than was brought forth in *Ashland*. The trial court's findings were much different. Utilizing the comparable sales, and the opinion evidence, the trial court found that the value of helium at the wellhead was .60 to .70 per

mcf. As a result, the government was not required to pay any more than $12.00 which it had paid for the gas at the well plus extraction expense including building a plant. This was because the value found was less than the $3.00 amount beyond which the government was required to indemnify. The additional amount, .60 to .70 had to be paid by the Helex companies to the lessee-producers.

If the formula approved in the present case were to be applied to the *Helex* cases there may be a far different result. I am not saying that it will. I do not know. The trial record is superior in the *Helex* cases and this could change it. On the other hand, the work-back doctrine is firmly adopted. If this present *Ashland* ruling becomes a precedent for the upcoming *Helex II* cases, the result could be a disaster to the government in that it could virtually double its cost. The price could go from $12.00 (the amount already paid and which under the *Helex* trial court's decision is the entire sum), to as high as $24.00.

The *Ashland* case is in sharp contrast. The trial court, as we already know, employed the work-back method in arriving at values of commingled helium. The prices which it adopted were $11.76 to $16.98 per mcf for the years 1963-72. This was in addition to the $10.30 already paid by the government to Phillips to cover the total cost of extraction plus cost of gas at the well. The majority opinion in this case gives restricted approval to the work-back method. It remands for additional proceedings to reconsider three factors used. In remanding the case the majority

opinion has not, as we have also noted, given the trial court any guidance as to what is sought and as to how these factors are to be determined. Therefore, the outcome of the remand as it effects the values in the *Ashland* case cannot be anticipated. These values may be lower or they could just as easily be higher. Thus, both the viewpoint and the result in *Ashland* are entirely different from the approach and result in the *Helex II* cases. That is why I am apprehensive as to possible results in the *Helex* cases when the court gets around to applying the work-back theory as now enunciated to the *Helex* cases.

We are mindful that the government has already paid the extraction companies a total of about $12.00 per mcf for the 36,500,000 mcf's of crude helium in *Helex*. This is a sum of about $438 million for helium which has been purchased and which has been stored under the conservation program. We cite it to show the magnitude of this purchase and the extent to which the government would be called upon to indemnify if the work-back method were to be applied in the *Helex II* cases. If the pattern of the present case continues, there could be additional payment of from $9.00 to $12.00 per mcf. It remains to multiply 36,500,000 mcf by the $9.00 or $12.00 addition in order to view the dismal news.

I submit that the *Helex II* cases ought to have been the precedent and the model rather than the Ashland case.

* * * *

Finally, this entire helium conservation program is affected with a public interest. As the majority notes, there is no competition to provide low prices. It is a monopoly condition and the determination of reasonableness of prices has devolved on the courts. The court should, of course, see to it that the companies involved in the production of the helium receive fair compensation. Fair compensation does not mean that the participants should receive profits of the possible magnitude indicated here.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 73-1797, 73-1798, 73-1799

ASHLAND OIL, INC., PLAINTIFF

v.

PHILLIPS PETROLEUM COMPANY, DEFENDANT

and

UNITED STATES OF AMERICA, INTERVENOR

(FILED JANUARY 27, 1975)

Before BREITENSTEIN, SETH and DOYLE, Circuit Judges.

SETH, Circuit Judge.

This action was brought to recover the reasonable value of helium intermixed with natural gas, extracted therefrom and sold by the defendant Phillips to the United States. The plaintiff prevailed against the defendant and the Government as intervenor in the lower court, and they both appeal. Plaintiff also appeals, but only as to the ultimate division of the proceeds derived from the helium as ordered by the trial court.

The case was commenced in the Southern District of Texas, but transferred at defendant's request to the Northern District of Oklahoma. The complaint asserts jurisdiction based on diversity and this ground was established. The Government intervened as plaintiff, but was realigned as a defendant.

The general description of the occurrence of helium, its characteristics, and how it became an issue is described in the several opinions hereinafter cited. It is, however, necessary to describe the contractual relationship which existed between the defendant Phillips and the Bureau of Mines during the pertinent time period as it bears on the relationship with plaintiff.

The Helium Act (50 U.S.C. §§ 167 et seq.) was directed to the conservation of helium present in natural gas and which was being wasted by the use of the gas as fuel. It was determined that the best method to prevent this loss was to intercept the flow of helium-bearing natural gas after it had been gathered and where large volumes were being transported by pipeline to the fuel consumers, and to extract the helium therein intermingled. At these points the pipeline companies had possession of the gas stream.

The Bureau of Mines pursuant to the Helium Act entered into contracts with those in possession of the natural gas stream to purchase helium after it was extracted from the stream. The record shows that this decision to contract apparently was brought about by the inability of the Bureau to then ascertain the

identity of the interest owners in the helium and to deal with them within any reasonable time. The Bureau indicates that there were some 30,000 landowners involved and several hundred lessee-producers of the gas. The production is from several states and the interest owners reside in many different states. By the contracts with the defendant and others the Bureau made possible the construction of extraction plants and soon came into possession of the helium so removed from the large gas stream. Waste of the helium was so prevented, and the purpose of the Helium Act was accomplished.

By the contract with defendant Phillips the helium was physically acquired, but the ownership and compensation problems were put off to another day. The Bureau thus used by this contract the advantageous position of one in possession; postponed the inevitable legal problems, and placed itself in the position of a defendant when the problems came before a court.

In the contract between the United States as buyer and the defendant as seller covering the purchase of helium, a specific amount was provided as the sales price; further, in paragraph 7.4 it was provided that in addition to such amount the buyer would pay to the seller the amounts ". . . that Seller shall pay subsequent to the date of this contract . . . to parties other than itself . . . for the acquisition of helium in the natural gas . . . or for any interest therein." It provided that such payments to qualify would have to be made with the consent of the buyer, and that "consent" included claims that ". . . have been judi-

cially determined in favor of any claimants by any Federal Court or the highest appellate court of any state," and payments made in accordance with the findings, principles, and conclusions of such "judicial determination." Under the contract formula the defendant would pay the first $3.00 per Mcf to third parties and the Government would pay the rest. The result would be that the ultimate payment to the "owners" was to be so shared by defendant and the United States.

It is obvious that litigation such as this wherein compensation is demanded by the interest owners of the helium was contemplated and was provided for in the contract. It was apparent that some knotty legal problems would have to be met in order to determine who the interest owners were, and to decide whether or not they had already been compensated for the helium under the leases, the gas purchase contracts, or the Natural Gas Act. These postponed legal problems were in large part considered in the *Consolidated Helium Cases* (Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.)). The basic legal relationships among the landowners, producers, and gas purchasers were established, as was the relationship of the Natural Gas Act and the Helium Act. The problem of reasonable compensation, and who should pay, was not decided and was remanded to the trial court. These were decided under federal law in a federal interpleader action.

When the matter of compensation is in issue we are faced with a different segment of the physical and

legal journey helium makes from the natural gas well to the storage facilities of the Bureau of Mines than we have considered before. The possession and interception of the gas stream, the separation of the helium therefrom, and its delivery to the United States under the contract arrangement all become important. The relationship of the contracting parties to those who now have been determined to own interests in the helium, and the values of the helium are the center of focus.

The position of the United States as a party herein is somewhat unusual. It filed a motion to intervene as a party plaintiff with a "Complaint in Intervention of the United States" attached. This motion was granted. The complaint of the Government stated that the court had jurisdiction under 28 U.S.C. § 1345, recited the existence of the contract for the purchase of helium from Phillips, asserted that Phillips had delivered to the United States "large quantities of a helium-gas mixture" for which it had been paid "substantial sums of money." This complaint acknowledges that the plaintiff Ashland is seeking "fair market value" of helium in the gas it sold to Phillips which was processed for helium, and the helium sold to the United States under the contract referred to. The Government further alleges that Ashland has already been paid for the helium content along with the hydrocarbons, and in any event the value of the helium content is "nominal." The complaint asserts that: "An actual controversy exists between the United States and Ashland as to whether payments

between Phillips and Ashland for the gas as produced was payment for the helium content." The Government also asserts that it ". . . has a real and substantial interest in this litigation because of a provision in its contract with Phillips under which it may be under a duty to indemnify Phillips for additional payments . . ." The Government prayed for a determination that Ashland had already been paid in full, and if not, that the fair market value of the helium was "nominal." Phillips and Ashland answered the Government's complaint. Ashland in its answer prayed for costs and general relief.

As the trial opened, the attorney for Phillips suggested that the United States be realigned as a party defendant. The court then said: "The Court will order that the style be changed to Ashland Oil and Refining Company, Plaintiff, versus Phillips Petroleum and United States of America as defendants." The findings recite that at the Government's request, it was aligned as a defendant and was an intervenor. The United States participated in the trial, cross-examined witnesses, put on a witness of its own, objected to the plaintiff's findings, and submitted proposed findings. The judgment entered ran against Phillips only. The United States has fully participated in this appeal.

As indicated above, this action was brought against the defendant Phillips to recover the reasonable wellhead value of helium commingled with the FPC jurisdictional gas, but separated at defendant's plants constructed pursuant to the Helium Act and delivered

to the Bureau of Mines. The contract between the defendant and the Bureau of Mines is considered above. The suit was tried within the holding of Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.) (*The Consolidated Helium Cases*, or *Grounds*).

On this appeal Phillips devotes much of its brief and argument to contentions which were advanced in *Grounds*, there considered and rejected. It would serve no purpose to again treat these arguments in this opinion. Instead it is sufficient to refer to the *Grounds* opinion for the disposition of these points.

The *Grounds* case was remanded for a determination of the reasonable value of the helium in issue, the other points having been decided, and the basic legal relationships determined. Thus here we are faced with the value problem, and some related issues which have not come from the remanded case but from another direction.

It must be accepted that the "value" sought to be determined in this suit is a factual matter arrived at through the application of the proper legal doctrines. The appellants do not attempt to separate the factual issues from the legal issues in the application of Rule 52.

The appellants urge as a basic error on the part of the trial court that it chose the wrong method in arriving at a valuation. The defendants put on extensive testimony and exhibits as to transactions concerning helium-bearing gas wherein a value was ascribed to the helium component on a market value

theory. These events covered a broad time and geographical space, and involved both governmental agencies and private parties. The trial court held that there was no free competitive market, and inferentially held that these transactions were of no probative value because they were not comparable. Instead the trial court used a different valuation method—a value less expense of benefication.

The appellants urge that the use of such a value less expensive method was error in the face of their market value evidence. The Government on this point cites a number of condemnation cases, including United States v. Miller, 317 U.S. 369; United States v. Sowards, 370 F.2d 87 (10th Cir.); and United States v. Featherston, 325 F.2d 539 (10th Cir.). The record discloses that the rejection by the trial court of the evidence of "sales" was well within its discretion. As indicated above, the transactions which had an arguable similarity were very remote in time or place, and those closer in time and space had little or no similarity. As a matter of law, the trial court was within its discretion, in view of the evidence before it, in selecting the value less expense formula as a secondary method. There was ample evidence before it on the elements of the method.

The appellants also argue that the value less expense method was improperly applied in that proof was deficient as to certain elements, that mistakes were made, and that "trifling recognition" was given to certain evidence. We will take these references to mean that there was not substantial evidence on the

several factors or elements of the method of valuation.

As to the several elements, the appellants urge that the amount used as the "return on investment" expense was not sufficient. The trial court used a figure which was part of the testimony of plaintiff's witnesses, and the method by which it was arrived at was so presented. There was no substantial contrary evidence presented at trial although on appeal appellants assert deficiencies in the method. This was a factual determination and there was substantial evidence to support the trial court's findings although we might not have reached the same result.

The appellants also object to the allowance made by the trial court of $2.00 per Mcf for the "treatment" of the "crude" helium sold to it by Phillips, but to be incurred by the Government before resale by it, as insufficient in that it did not include transportation and storage. Matters of expense to be incurred subsequent to the delivery and perhaps some transportation from place of delivery to the underground storage are not shown to have been omitted from the $2.00 figure although it was denominated a "treatment" or "processing" cost. In any event, these costs are more properly attributable to the general conservation program as the duration of the storage and additional transportation are unknown factors under the record. The use of the deduction was proper and appellants have not shown that it was not supported by substantial evidence.

The trial court used a figure of $20.00 per Mcf for the selling price of helium, and this was the "value" element of the value less expense method. This figure was testified to by the witness for the plaintiffs, and the amount is well within the Bureau of Mines Yearbook figures for the several years in issue. The evidence supports this figure also, and this price issue was not directly met by defendant by way of proof.

The Government, in an argument again based on condemnation doctrine, urges that the helium values were *created* by its own purchase program—The Helium Conservation Program, and it should not have to pay for such values. It cites several condemnation cases on this point and United States v. Fuller, 409 U.S. 488, which in turn cited United States v. Cors, 337 U.S. 325. This again concerned payment for something requisitioned by the Government. The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value.

The appellants vigorously attack the use by the trial court of the value of hydrocarbon liquids produced at the helium plants in the value less expense calculations. The trial court, on the basis of extensive testi-

mony, and also on exhibits consisting of letters from Phillips, allocated part of the plant expense to these liquids as by-products. The evidence is clear that an increase in the production of liquids would result from the helium plant operation. This would be an increase over what had been experienced before and over ordinary extraction plants. The witnesses calculated the amount to be so used in the formula. This was not contradicted in amount by appellants, as instead they maintained that the increase in liquid production did not result at all from the treatment of the gas stream for helium extraction. The record shows that increased quantities of wet gas were directed to at least one of the plants and this could make a difference in the production of liquids, but no figures were produced by defendants. Instead the defendants maintained in the face of overwhelming evidence to the contrary that the helium extraction made no difference. Under this state of the record, we must hold that the trial court was justified in using the figures it did as they were supported by substantial evidence. Different quantities of liquids were produced at different plants, and this resulted in different helium values at different plants. This, in view of the evidence, was a consequence of the application of the expense element in the formula. Evidence on this issue was presented by the parties as indicated above, and although the result may not have been as precise as it could have been, it is again a factor supported by substantial evidence.

The Government makes the point that the value of helium at the wellhead determined by the trial court exceeds the base price for the helium-nitrogen mixture it was buying from Phillips under its contract. This is the consequence of the decision, but there is no reason why the wellhead price should be determined by the contract price. The contract between the appellants was negotiated between them alone, and the pricing was the evaluation by them of the entire economic consequences flowing from the contract including many significant factors such as its duration, warranties, and indemnities. We have described the contract at the outset of this opinion. Attention should however be directed again to the evaluations made of the legal questions, especially the title questions. The Government agreed basically to pay Phillips for its interest in the helium and then to pay more if other interest owners established their claims. Thus the price "paid" for all the interests in the helium has not yet been determined. The considerations leading to this method were described above. The value here sought to be established is independent of the contract base amount and covers all interests of the proper parties.

We have considered Lippert v. Angle, 211 Kan. 695, 508 P.2d 920. It states the traditional preference for comparable sales proof. The case does not involve the separate valuation of helium. The plant was very small, and the situation is not comparable in any way. *See also* Greenshields v. Warren Petroleum Corp., 248 F.2d 61 (10th Cir.).

This appeal also raises issues as to the allowance of prejudgment interest, attorney fees, and the matter of limitations. The trial court tried the case as a federal question case, relying on our opinion in Texaco Inc. v. Phillips Petroleum Co., 481 F.2d 70 (10th Cir.), which was thereafter reversed by the Supreme Court in Phillips Petroleum Co. v. Texaco Inc., 415 U.S. 125.

The original *Consolidated Helium Cases* were based on federal interpleader jurisdiction, and also federal law was applied. The case before us on this appeal started as a diversity suit. We have described at some length above the participation of the United States in this action, especially the initial intervention as a plaintiff expressly under 28 U.S.C. § 1345. It is apparent however that its alignment at all times was with the defendant Phillips on all important issues. No relief was sought by Ashland directly against the United States. The trial court found the elements of a condemnation or seizure by the United States, but this analysis of the manner in which helium was acquired was considered in the *Consolidated Helium Cases*, and the arguments were rejected.

As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper. The action of the Government in entering the case as a plaintiff under 28 U.S.C. § 1345 is a significant factor to be considered. The real party in interest thus appeared formally to challenge the claims of Ashland. The Government so asserted that it had a real and substantial interest in the litigation, and that an actual controversy existed between it and Ashland. It is

apparent that under the contractual arrangement, the United States is to pay to Phillips the amounts that Phillips "shall pay" to other parties for the acquisition of helium in the natural gas. Thus the United States is liable for the additional amounts which Phillips will have to pay by reason of this action. The Government has here entered the litigation to assert its own position and interest. This is initially a matter of dollars, but the Government still has possession of a large part of the helium in question, and this possession can put a somewhat different cast on the problem. These circumstances and the intervention could very well have changed the action to something other than the usual diversity suit at least for the purpose of the application of *Erie v. Tompkins*. This has interesting possibilities, but in any event, the circumstances direct that federal law be applied.

As indicated above, and as demonstrated in Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10th Cir.), and by the record here, the Government is ultimately faced with claims made by many thousands of interest owners from many states relating to production from Kansas, Oklahoma, and Texas. Each state has different legal doctrines relating, among other things, to the nature of interests in oil and gas, and what rights are created by oil and gas leases. With the primary liability for the dollars, and for the determination of ownership resting with the United States which obtained possession of the helium, we hold that the application of the rule expressed in Clearfield Trust Co. v. United States, 318 U.S. 363,

is indicated. One of the most significant factors is the one indicated above, that is, the fact that the United States ended up with the helium. It directed, by contracting, the diversion of the helium to itself before resolving the obvious ownership problems with a multitude of claimants having diverse legal relationships to the helium, depending upon the place where the natural gas was produced and upon their contractual positions. The United States, again by contract, sought to handle these problems by providing for reimbursement to Phillips, and it may have done so. The Government nevertheless obviously has the basic responsibility and liability, as it recognizes by its intervention.

Erie v. *Tompkins* does not demand the application of state law to all diversity actions. The Court in the *Clearfield Trust* case set out an exception which was there applied to "obligations" of the United States and later expanded. The case concerned the forgery of a Government check, and a delay in notice by the Government to the bank beyond the period contemplated under state law. The Court held that rights of the Government relating to commercial paper it issues are determined by federal and not state law. The Court said that the authority to issue the check in question originated in the Constitution and statutes of the United States and was not dependent on the laws of any state. In the matter before us, the helium was acquired by the United States by contracts as authorized by federal statutes. This contracting with private enterprise was suggested by statute. As stated

by the Court in the cited case, "The desirability of a uniform rule is plain." *See also* National Metropolitan Bank v. United States, 323 U.S. 454, limited by Bank of America v. Parnell, 352 U.S. 29. The War Bond cases in state and federal courts lead to the same result. *See* In re Stanley's Estate, 80 P.2d 332 (Colo.). The Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, also indicated a considerable area to be omitted from the application of *Erie*. There an action by the FDIC was brought on a note given to a bank by the defendant, and the Court applied federal law. Also in the shareholders' liability action in Holmberg v. Armbrecht, 327 U.S. 392, in the solution of a limitations problem, the federal law was applied. Generally, *see* 59 Harv. L. Rev. 976, and 105 U.Pa.L.Rev. 797.

Under *Clearfield* when the United States seeks to litigate or seek a remedy arising from transactions it has entered into in the ordinary commercial world to carry out its program, it has been held that federal law may be applied. The federal courts can adopt a governing rule of law in such circumstances if there is no statutory direction to the contrary. *Clearfield* expressly so held. 318 U.S. at 366. *See also* United States v. Allegheny County, 322 U.S. 174. *Clearfield* thus indicates that the Court may apply state doctrines or parts of them as "federal law." In United States v. Standard Oil Co., 332 U.S. 301, the Court stated that the interests of the Government and its legal relationships may be so determined. The impact of the application of state law upon the governmental

interests is a factor of great weight. *See* United States v. Mitchell, 402 U.S. 190.

The Court in United States v. Little Lake Misere Land Co., 412 U.S. 580, considered the application of a Louisiana statute to the reservation of a mineral interest in land acquired by the United States. The factors discussed above were there treated, and the process was described as a "choice of law" (federal or state) matter. The Court there said:

> "However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and 'the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that purpose.'" [The quotation included being from Mishkin, 105 U.Pa.L.Rev. at pp. 805-6.]

The Court found further that the federal land acquisition program in *United States* v. *Little Lake Misere Land Co.* conflicted with the state law on the duration of reserved mineral interests, and said: "The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

In the case before us, the United States was seeking to carry out the Helium Conservation Program then considered of great urgency and importance. It sought to, and did, acquire possession of the helium as directed by the legislation. The action of the Bureau of Mines was effective. In so doing it set up the contractual walls between itself and the land owners and gas

producers, and put off the inevitable day of reckoning as to ownership. Phillips is really only a nominal party and looking at the substance, the Government has the responsibility arising from its acquisition and possession of the helium. In the face of the multitude of claimants, the variations in state law, and the Clearfield doctrine, the trial court was correct in not applying *Erie* v. *Tompkins.*

We find no merit to the contention of Phillips that it is entitled to a setoff for any sums previously paid to Ashland for purchases of jurisdictional gas.

The court in the *Consolidated Helium Cases* considered the ownership of the interests, title to the helium, and described how these passed down the gas stream. This determination prevails. The trial court, as to the interest of the land-owners-lessors, apparently followed a confiscation-condemnation theory and divided the value of the helium to be recovered from defendant Phillips equally between the lessors and lessees. Our opinion in the *Consolidated Helium Cases* requires that this division be in accordance with the lease terms, and thus the same division as applied to the hydrocarbons. The judgment of the trial court making an equal division between lessor and lessee of the proceeds attributable to helium values must be and is reversed with directions to enter judgment providing for a division in accordance with the terms of the leases, and the terms of other agreements relating to the shares of production, or payment for shares of production, if such be applicable.

The issue of limitations has been raised together with the tolling of whatever statute may be applicable. This litigation concerning the property interests in helium and the right to compensation, considering the related cases, has been protracted and equitable considerations applicable to periods of limitation have come into play. *See* deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir.). We must conclude that this action has not been barred. American Pipe & Construction Co. v. Utah, 414 U.S. 538.

The trial court acted within its discretion under federal law in the allowance of prejudgment interest. Royal Indemnity Co. v. United States, 313 U.S. 289; St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (10th Cir.).

As to attorney fees awarded by the trial court, we are unable to find any statutory provision for them or any rule of practice which would authorize such fees. The Supreme Court has, since the trial court's decision, decided F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, a Miller Act case. The opinion includes a direct and intensive consideration of attorneys fees. The Court there defines the basic rule:

> "The so-called 'American Rule' governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees 'are not ordinarily recoverable in the absence of a statute of enforceable contract providing therefor.' "

The Court concluded that Miller Act suits are "plain and simple commercial litigation," and the Court

would not change the American Rule "in the context of everyday commercial litigation." We must hold that this litigation is not so dissimilar to Miller Act suits as to bring about a different result as to attorney fees than expressed in *F. D. Rich Co.*

The judgment of the trial court is thus REVERSED as to the award of attorney fees, and as to the equal division between lessor and lessee of the proceeds attributed to the value of the helium, as above indicated. The judgment is AFFIRMED in all other respects.

APPENDIX D

UNITED STATES DISTRICT COURT
N.D. OKLAHOMA

No. 67-C-238

ASHLAND OIL, INC., PLAINTIFF

v.

PHILLIPS PETROLEUM COMPANY, DEFENDANT

and

UNITED STATES OF AMERICA, INTERVENOR

Aug. 13, 1973

As Corrected Aug. 31, 1973

OPINION

BOHANON, District Judge.

This action was initially instituted in the United States District Court for the Southern District of Texas, and was later, by proper proceedings transferred to this Court for trial and disposition. Ashland Oil and Refining Company (hereinafter referred to as Ashland) originally claimed the right to recover moneys from Phillips Petroleum Company (hereinafter referred to as Phillips) representing an alleged deficiency in payments for sale of natural gas under the jurisdiction of the Federal Power Commission. Ashland also asserted claims against Phillips to be paid for helium contained in the jurisdictional mass

of natural gas, and which was extracted from the natural gas stream by Phillips under contract with the United States of America through the Department of Interior, Bureau of Mines.

The Court has diversity jurisdiction and federal question jurisdiction, 28 U.S.C.A. §§ 1331(a) and 1332.

Ashland abandoned its claim against Phillips for deficiency payments for sale of natural gas under the jurisdiction of the Federal Power Commission by reason of proceedings before the Federal Power Commission, and an appeal from its order (Ashland Oil and Refining Company v. FPC, 421 F.2d 17, 6th C.A.). Consequently, the only claim remaining for trial and determination by this Court is Ashland's claim for recovery of the reasonable value of helium contained in the natural gas stream delivered by Ashland to Phillips.

Plaintiff Ashland acquired all of the interests of United Producing Company which had entered into a contract with Phillips Petroleum Company on November 8, 1945 (amended Oct. 1, 1950 & June 27, 1956) providing for the sale of natural gas from 15 wells located in Sherman County, Texas. These same parties entered into another gas purchase agreement on April 15, 1953, (amended June 27, 1956) providing for the sale of natural gas from three wells in Hansford County, Texas. These agreements were properly filed with the Federal Power Commission as provided by law and rate schedules were fixed for the sale of said gas. These filings were required under

the Natural Gas Act (15 U.S.C. § 717 et seq.) because Ashland's deliveries to Phillips constituted sales of natural gas for resale in interstate commerce. Ashland succeeded to all the rights and interest of United Producing Company. All of the wells above referred to are subject to the contract between Ashland, as successor to United Producing Company, and Phillips Petroleum Company, and Phillips Petroleum Company extracted helium which was contained in the natural gas stream as delivered by Ashland to Phillips.

Ashland's contention is that the title to the helium in the contained natural gas did not pass to Phillips under the gas purchase contracts and if and when Phillips elected to extract the helium from the natural gas stream, plaintiff Ashland was entitled to payment therefor from Phillips for the reasonable value of such helium less certain costs of extraction, and other deductions hereafter referred to.

The defendant contends that when it purchased the gas stream from Ashland, it purchased all of the elements thereof including the helium, and inasmuch as Phillips paid Ashland the Federal Power Commission rate for the gas delivered to Phillips, Phillips became the owner of the entire stream, including the helium, and therefore, is not liable in any sum to Ashland for the helium extracted. Further, Phillips presents the defense of Statute of Limitations claiming that if liable, they are liable only for the helium extracted from the natural gas for two years prior to the filing of this action and thereafter; further Phillips claims

that by reason of payment to Ashland for the natural gas, plaintiff is barred by the defenses of accounts stated, accord and satisfaction, and to require payment now would be a violation of the Fifth Amendment to the Constitution of the United States.

The United States of America by Order of the Court was realigned as a party defendant.

Findings

1. Helium is an unusual element; it is a gas which is inert and noncombustible and is the second lightest element known. Helium is so inert that it will not chemically react or combine with other elements and thus remains as helium forever. It is tasteless, colorless, odorless and invisible. For a more complete description of helium, its unusual characteristics, its uses, and where found, etc., see Northern Natural Gas Co. v. Grounds, 441 F.2d 704 (10 C.A.) and in the Opinion of District Judge Wesley E. Brown, 292 F.Supp. 619 (D.C. Kan.).

2. The United States of America, through the Department of Interior and the Bureau of Mines of the Department, recognizing the need for the conservation of this rare material and its scarcity, and its need for defense purposes and other important uses, Congress enacted the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) authorizing the United States to enter into a program of conservation of helium for future use; under this program, private companies negotiated contracts with the United States

of America through the Department of Interior, Bureau of Mines, to construct plants for the extraction of helium from natural gas streams, then being produced from the Hugoton-Panhandle area; otherwise, this valuable material would be lost at the burner tip of the ultimate user of the gas and discharged into the air as residue.

3. Prior to 1961, the United States Government, with minor exceptions for a short time, was the sole extractor and source of commercial helium. It controlled and fixed the price of all wholesale sales of helium.

4. Pursuant to the authority granted by Congress, the United States entered into five long-term helium purchase contracts with four companies, one of which was Phillips Petroleum Company, which contracted on November 13, 1961, with the United States to sell a helium gas mixture from two plants it proposed to build, the Sherman Helium Plant and the Dumas Helium Plant. These plants were constructed so as to extract for delivery and sale to the government a helium gas mixture (crude helium) which was to consist of at least 50% helium under the contract requirements, the remainder being essentially nitrogen. Under this contract, the United States agreed to pay a base price of $10.30 per m.c.f. (thousand cubic feet) of contained helium in the crude product, which price was subject to escalation in accordance with the contract. The base price was also subject to escalation in the event Phillips was required to pay third parties

"for the acquisition of helium."[1] Specifically, under the contract between the United States and Phillips, producers of commingled helium such as Ashland and the mineral or royalty owners, being third parties, and if they were entitled to recover from Phillips the reasonable value of the helium produced from the commingled gas Phillips was required to pay under paragraph 7.4 of the contract, part 2 of the unit price only approximately $3.00 per m.c.f. and the United

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[1] "In addition to all other amounts payable under this contract Buyer shall pay to Seller all amounts, except as hereinafter provided, that Seller shall pay subsequent to the date of this contract, directly or through an affiliated company, to parties other than itself or an affiliated company for the acquisition of helium in the natural gas, as defined herein, or for any interest in such helium. Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer; and for the purposes of this paragraph 7.4 Buyer shall be deemed to have consented to any and such payments in satisfaction or settlement of any claims to helium in the natural gas, as defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state. Further, Buyer shall be deemed to have consented to any and all such payments under circumstances similar to any such judicially determined claim if such payments are made generally in accordance with the findings, principles, and conclusions of any such judicial determination. The amounts that Buyer shall be required to pay to Seller in accordance with this paragraph shall not include an amount to be calculated applicable to each such acquisition equal to twenty-nine (29) percent of the weighted average of part two of the unit price or unit price in effect during the time covered by such acquisition multiplied by the volume in MCF of helium in the natural gas, as defined herein, covered by such acquisition."

States under the contract was required to reimburse or indemnify Phillips for any excess of $3.00 per m.c.f. which Phillips was required to pay. This was an important part of the contract because it indemnified Phillips against required payments to third persons of the amount in excess of $3.00 per m.c.f. and thus gave the United States the right to purchase this helium for a lesser sum than, no doubt, otherwise would have been required.

5. The United States took delivery of the helium gas mixture from Phillips and transported it through its own pipeline to storage in government-owned storage facilities at Cliffside Field near Amarillo, Texas. From there it can be withdrawn as needed, and purified to grade A helium (99.995% pure helium) in government-owned plants at approximately $2.00 per m.c.f. helium.

6. Under the contracts the government agreed to take all of the helium produced up to certain amounts, and the government sold grade A helium at wholesale F.O.B. its helium plants for $35.00 per m.c.f. and has done so since the fall of 1961. All federal departments and agencies were required to purchase their helium needs from the United States at this price. The Bureau of Mines has the statutory authority and responsibility to fix the price at whatever level is necessary to pay for costs associated with the helium conservation program, including any additional payments which may be required to be paid by the United States as a result of this case.

7. Beginning in 1961, several private helium plants have been built to sell pure helium in the private commercial market. Although the government price for its helium has remained at $35.00 per m.c.f., the prices for which helium has sold on the private market from 1963 through 1972 have ranged from $35.00 to approximately $20.00 per m.c.f. Such prices are wholesale prices and the only market prices for sale of helium in the United States during the period in question.

8. The Court finds the fair and reasonable value of grade A helium during the periods here involved was $20.00 per m.c.f.

9. Recognizing the benefit to United States and the importance of paragraph 7.4 of the United States-Phillips helium contract, the Associate Solicitor of the Division of Mineral Resources of the Department of the Interior, and who approved the contract provision, correctly described it as an escalation in price:

> "This provision in effect provides for escalation in price when the cost of the raw material increases." (Pls. Ex. 39, p. 3)

10. By reason of the above escalation provision in the contract, the United States was able to obtain a base price substantially lower than would otherwise have been possible.

11. There was no known wellhead price fixed for the helium gas in the gas stream, and it was and is impractical and uneconomical to attempt to extract the helium gas at the wellhead. This can only be done

economically through large plants with large volumes of gas to process.

12. The gas stream delivered by Ashland to Phillips contained all of the natural gas liquids, such as butane, propane and pentanes plus, which Phillips extracts and did extract from the feed gas and markets these gases in liquid form. Because these rich liquids are in concentrated form (about 10% of the volume of the total feed gas stream), Phillips has been able to extract and market substantial additional quantities of such liquids, above and beyond what its existing gasoline plants would be able to extract at a substantial savings in cost. These additional liquids are in substance a byproduct of the helium plant operation.

13. Experts who testified in the trial of this case estimate that the Texas Panhandle, Southwestern Kansas and Western Oklahoma constitute 99% of the free world's known commercial reserves of helium. This area is known as the Hugoton Field, and Ashland wells which deliver gas to Phillips are in this field.

14. To arrive at the reasonable wellhead value of Ashland's helium delivered to Phillips, there should be deducted from the value those costs incurred by Phillips in extracting and delivering the helium and also the cost of purification. In determining these costs, the total costs of the helium plant itself should be credited and reduced by a fair allocation of a portion of such costs to the incremental, or additional liquids, which the helium plant generates. This can

equitably be done by calculating a fair share of the incremental benefits accruing to Phillips in its natural gas liquids operation as a direct result of the helium plant operation. Failure to assign a portion of helium plant costs to the incremental liquids operation would inequitably burden the helium plant with substantial costs which are incurred and which result in the production of the incremental liquids.

15. After allowing for the following deductions, the Court finds that the reasonable value of the helium delivered by Ashland to Phillips is shown in the following table. The deductions referred to include:

(a) All helium plant costs, including a 10% rate of return to Phillips on its stockholder equity;

(b) The incremental liquids benefit which should be applied to reduce costs of the helium plant;

(c) $2.00 per m. c. f. for purification.

16. The Court finds and is of the opinion that the following table shows the reasonable cost of extracting the helium, the reasonable value of helium on a yearly basis from the Ashland gas delivered to Phillips and further shows the volume of helium per m.c.f. extracted by Phillips for the ten year period in question and the total value thereof; likewise it shows the interest computed at 6% per annum for the total recovery of helium delivered by Ashland and recovered by Phillips and the total amount of money judgment plaintiff is entitled to recover:

Reasonable Value Calculations

	A	B	C	D	E	F	G	H	I	J
	Helium Plant Costs (Plt's Ex. 61 & 62, line 10)	Liquid Benefit Credit (Plt's Ex. 61 & 62, line 12)	Net Helium Cost (Columns [a] less [b])	Minimum Value for Crude Helium $20.00 Grade A Helium Value less $2.00 /mcf Purification Cost	Reasonable Value of Helium Delivered by Ashland to Phillips (Columns [d] less [c])	Vol. of Ashland Helium Extracted by Phillips (Plt's Ex. 14 & 15, Sch. 3)	Total Reasonable Value of Ashland Helium Extracted by Phillips Awarded to Ashland	Periods (Yrs.) at interest to July 1, 1973	Interest at 6% per year	Total Recovery By Ashland
					SHERMAN HELIUM PLANT					
1963	$4.82	$1.01	$3.81	$18.00	$14.19	7,791	$110,554.29	9½	$63,015.95	$173,570.24
1964	3.53	.10	3.43	18.00	14.57	8,075	117,657.32	8½	60,010.33	177,667.65
1965	4.16	.37	3.79	18.00	14.21	8,997	127,847.37	7½	57,531.32	185,378.69
1966	4.09	.45	3.64	18.00	14.36	7,521	108,001.56	6½	42,120.61	150,122.17
1967	4.94	1.06	3.88	18.00	14.12	5,757	81,288.84	5½	25,825.32	107,114.16
1968	4.22	1.16	3.06	18.00	14.94	6,742	100,725.48	4½	27,195.88	127,921.36
1969	4.50	.92	3.58	18.00	14.42	5,991	86,392.56	3½	18,142.44	104,535.00
1970	5.16	2.20	2.96	18.00	15.04	5,460	82,118.40	2½	12,317.76	94,436.16
1971	5.31	4.29	1.02	18.00	16.98	5,944	100,929.12	1½	9,083.62	110,012.74
1972	5.52	3.97	1.55	18.00	16.45	6,082	100,048.90	½	3,001.47	103,050.37
					DUMAS HELIUM PLANT					
1966	5.95	.02	5.93	18.00	12.07	434	5,238.38	6½	2,042.97	7,281.35
1967	6.46	.78	5.68	18.00	12.32	950	11,704.00	5½	3,862.32	15,566.32
1968	5.91	1.01	4.90	18.00	13.10	949	12,431.90	4½	3,356.61	15,788.51
1969	6.55	.31	6.24	18.00	11.76	890	10,466.40	3½	2,197.94	12,664.34
1970	5.89	1.04	4.85	18.00	13.15	681	8,955.15	2½	1,343.27	10,298.42
1971	6.39	1.58	4.81	18.00	13.19	444	5,856.36	1½	527.07	6,383.43
									TOTAL	$1,401,790.91

17. The Court finds that the attorneys for plaintiff have expended many hours prosecuting this lawsuit against the defendant and are entitled to be paid the total attorneys fees as set out below:

Jay W. Elston firm	1059	hours at $50.00	$ 52,950.00
Houston, Texas	1059	hours at $35.00	37,065.00
Gerald Sawatzky firm	550	hours at $50.00	27,500.00
Wichita, Kansas	275	hours at $35.00	9,625.00
John M. Imel firm	201.4	hours at $50.00	10,070.00
Tulsa, Oklahoma		TOTAL	$137,210.00

The Court finds that the plaintiff Ashland should have judgment against the defendant Phillips for attorneys fees in the total amount of $137,210.00 for the services as above specified.

18. The Court finds that Ashland has prosecuted this lawsuit for the total helium contained in the gas stream from its respective gas wells delivered by Ashland to Phillips; that in prosecuting this lawsuit the plaintiff Ashland has incurred and paid the following expenses which are not chargeable to the defendant Phillips, but were reasonable and necessary and should be paid on the basis of one-half by Ashland and one-half by the landowners, mineral owners, otherwise royalty owners.

WITNESS:

Leo Garwin
326 Oklahoma Mortgage Bldg.
Oklahoma City, Oklahoma

Professional Services 1969:	$ 2,810.40	$10,071.35
1973:	7,260.95	

Troupe, Kehoe, Whiteaker & Kent
Certified Public Accountants
2900 Power & Light Bldg.
Kansas City, Missouri

Professional Services	$24,600.00	
Travel Services	1,353.73	
Duplicating	425.00	$26,378.73

Tulsa Reporting Service
526 Mayo Building
Tulsa, Oklahoma

Depositions: May, 1973	$ 277.15	
Transcript: June, 1973	4,686.00	$ 4,963.15

Interrogs, Inc.
2439 Bank of the Southwest Bldg.
Houston, Texas 77002

Depositions: April, 1973	$ 552.00	$ 552.00

Fulston, Siefkin, Powers & Eberhardt
Suite 600
4th National Bank Bldg.
Wichita, Kansas

	1968	1972	1973	
Travel	$157.12		$3,028.25	
Long Distance		$6.99	239.34	
Court Reporting				
Depositions			2,385.30	
Postage		.98	19.21	
Duplicating			434.40	
TOTAL	$157.12	$6.97	$6,106.50	$ 6,270.59

Martin, Logan, Moyers, Martin & Conway
Tulsa, Oklahoma
Expenses: (7-1-69 thru 12-31-72)

Duplicating	$ 3.90	
Long Distance	56.81	
Travel	14.40	$ 75.11

Ashland Oil, Inc.
Employee Travel Expense

	1972	1973	
Ray Althouse		$169.50	
J. C. Coogan		160.23	
B. J. White		101.02	
D. W. Cox	$179.03	405.66	
TOTAL	$179.03	$836.41	$ 1,015.44

Fulbright, Crooker & Jaworski
Bank of the Southwest Bldg.
Houston, Texas

	1966	1967	1968	1969	1970	1971	1972	1973
Long Distance	85.79	283.96	56.38	275.71	13.20	61.59	141.86	195.52
Duplicating	70.76	294.20	550.45	1,105.01	21.00	18.00	214.32	160.30
Filing Fees		25.00		15.00				
Travel		303.72	114.24	1,341.17	126.00	120.50	1,327.77	1,283.63
Printing				1,879.01	89.82			
Freight				11.30				
Secretarial				80.88			15.92	
Total	156.55	906.88	721.07	4,708.08	250.02	200.09	1,699.87	1,639.45

Total Expenses	$10,282.01	
Less Amounts Incurred in Connection with FPC Proceedings	1,922.89	$ 8,359.12
TOTAL OF ALL EXPENSES INCURRED		$57,685.49

The Court finds that the Plaintiff expended $57,685.49 in the prosecution of this lawsuit which is not assessable or taxable as costs against the defendant, Phillips, and that these costs should be divided equally between plaintiff and landowners, mineral owners (hereinafter referred to as royalty owners), and from the distribution made by plaintiff, Ashland, to royalty owners first should be deducted one-half of the cost above stated as paying the cost assessable to royalty owners.

19. The Court finds from a review of the pleadings, the Complaint, Amended Complaint, Stipulation of Facts, the exhibits and testimony that Ashland has brought, prosecuted and maintained this action on its own behalf and on the behalf of the royalty owners for the delivery of helium in the entire gas stream on a per well-head basis from the inception of the production of helium to June 30, 1972. The Court takes judicial knowledge of the oil and gas leases executed by royalty owners in favor of the lessee and the assignee of the lessee, and that at the time of entering into each of the respective oil and gas leases, no thought of helium rights was considered by either lessee or lessor; that no consideration passed from one to the other for any helium rights; that the helium as contained in the gas was an undealt with commodity except that the lessee had the exclusive right to enter upon the lessor's property and drill and produce gas from said premises; that the exclusive right to drill and produce gas is a perpetual right vested in the lessee so long as oil

and gas is produced by paying quantities from the premises by Ashland or its assigns.

The Court finds that the helium hereinabove referred to is and was the sole property of the royalty owners subject to the exclusive right of Ashland to drill and produce gas which contained helium and that their rights are equal and that the proceeds to be derived from the sale of helium should be equally divided between Ashland and the royalty owners and therefore the judgment herein rendered in favor of the plaintiff, Ashland, and against the defendant, Phillips, should be divided equally between Ashland and the royalty owners and on the basis of the payments heretofore made by Ashland to the royalty owners for gas produced and sold to Phillips and transported in interstate commerce under the regulations of the Federal Power Commission; and that Ashland shall first deduct from the royalty owners' portion of the judgment one-half of the costs of prosecuting this action. The equal division between lessor and lessee of the proceeds from the helium is required in equity; otherwise the windfall would give $7/8$ to Ashland and $1/8$ to the royalty owners, which would be unconscionable and an unjust enrichment to Ashland.

Conclusions of Law

This litigation is based primarily on the 1960 Act of Congress known as the Helium Act Amendments of 1960 (50 U.S.C. § 167 et seq.) where the United States was authorized and directed to enter

into a program of conservation of helium for future use.

The evidence is convincing to this Court that the United States, through the defendant, Phillips, and by reason of the Helium Act, confiscated the helium of the plaintiff and royalty owners rather than acquiring it by condemnation; nevertheless, the taking was in the nature of condemnation, and the reasonable value of the helium plus interest is proper; that the United States was obligated to pay the reasonable value of said helium in excess of $3.00 per m. c. f. which Phillips was required to pay for the helium all as provided by their contract.

The Court concludes that the law contained in Northern Natural Gas Co. v. Grounds, *supra* governs this case in the matter of reasonable value of helium and the obligation of the defendant to pay that value, and other authorities need be cited.

Further the United States Court of Appeals for the Tenth Circuit laid down certain guidelines for trial courts in Texaco Inc. v. Phillips Petroleum Company, 481 F.2d 70 (opinion filed July 13, 1973). Here the Court said:

> "We have here another controversy over helium. The basic background is outlined in our decision in the Consolidated Helium cases. See Northern Natural Gas Company v. Grounds, * * *. We there held that lessee-producers of natural gas could recover the reasonable value of contained helium out of interpleader funds created by the government's purchases of helium

from helium extraction companies and parent pipeline companies.

* * * * *

In Consolidated Helium we considered the claims of the pipelines and helium separation companies that they were entitled under their gas purchase contracts to receive the entire gas stream at the Federal Power Commission service rate and said that *'private contract law and the principles applicable thereto are not controlling.'* (Emphasis Added)

* * * * *

No good purpose would be served by repeating our analysis of the Natural Gas Act and the 1960 Helium Act amendments. We held that, * * *

> '* * * the reconciliation of the Natural Gas Act and of the 1960 amendments to the Helium Act to attain a symmetrical whole requires the conclusion that the FPC service rates do not apply to deny recovery of the contained helium which is processed in the separation plants.'

* * * * *

We thought that we made plain that we did not allow recovery on the application of any principles of equity, see 441 F.2d at 719-720, but on the ground that satisfactory utility regulation does not permit a utility rate to be used to obtain a commodity which is not within the contemplation of that rate.

* * * * *

We reject defendant's assertion that Consolidated Helium was an interim decision. The Supreme

Court denied certiorari, 404 U.S. 951, 92 S.Ct. 268, 30 L.Ed.2d 267, 404 U.S. 1063, 92 S.Ct. 732, 30 L.Ed.2d 751, and 404 U.S. 1065, 92 S.Ct. 732, 30 L.Ed.2d 754. The decision is final and is the law of this circuit. We say nothing on plaintiff's claim that Consolidated Helium is res judicata on the issues presented here. We are concerned with jurisdiction, not with the merits.

* * * * *

In Consolidated Helium we pointed out that there are over 30,000 persons receiving income from helium bearing natural gas produced by over 500 lessee-producers under thousands of leases.

* * * * *

The problems relating to the recovery of the value of the helium content of natural gas traveling in interstate commerce have arisen because of, and under, federal statutes. Plaintiff asserts rights under those statutes and is entitled to sue in federal court. We believe the federal courts have jurisdiction under 28 U.S.C. § 1331 (a)."

The Court concludes as a matter of law that the plaintiffs are entitled to a legal rate of interest because of the taking. See St. Paul Mercury Indemnity Co. v. United States, 201 F.2d 57 (C.A. 10); T. & M. Transp. Co. v. S. W. Shattuck Chemical Co., 158 F.2d 909 (C.A. 10); Louisiana & Arkansas Railway Co. v. Export Drum Co., 359 F.2d 311 (C.A. 5); Jacobs v. United States, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933).

The Court in Northern Natural Gas Company et al. v. Grounds et al., 441 F.2d 704 (10 Cir.), cert. denied, 404 U.S. 1063-1065, 92 S.Ct. 732, 30 L.Ed. 2d 751, issued a post-opinion order, pertaining to costs and the mandate, recognizing the significance of the interest question. Paragraph 15 of the Order dated March 16, 1972, states:

> "The right of the lessee-producers to interest, and the amount thereof, on any sums which the District Court may adjudge to be due and owing to them shall be determined by the District Court, subject to review by this Court."

The Court concludes as a matter of law that the plaintiff's attorneys are entitled to be paid by the defendants a reasonable attorneys' fee. See United States Fidelity & Guar. Co. v. Hendry Corporation, 391 F.2d 13 (C.A. 5); Boyd Callan, Inc. v. United States, 328 F.2d 505 (C.A. 5).

In T. F. Scholes, Inc. v. United States, 295 F.2d 366 at 370 (C.A. 10) the Court said:

> "The fixing of reasonable attorneys fees rested in the sound judicial discretion of the court.

In Texas Gas Corporation v. Hankamer, 326 S.W. 2d 944 (Tex. Civ. App.) it was held that gas and distillate delivered by appellees and processed in a plant was "material furnished", and an award of attorneys' fees was upheld.

The Court concludes as a matter of law that the plaintiff is entitled to judgment as follows:

(a) That plaintiff, Ashland, should have judgment against defendant, Phillips, for helium extracted for the ten-year period from 1963 to December 31, 1972, together with yearly interest thereon at the rate of 6% per annum ending June 30, 1973, in the total amount of $1,402,800.91.

(b) That plaintiff should have judgment for attorneys' fees, otherwise professional services rendered by plaintiff's attorneys in the prosecution of this action in the amount of $137,210.00.

(c) That the royalty owners should be paid one-half of the proceeds derived from the sale of helium less one-half of the expenses of $57,685.49 incurred and paid by Ashland in the prosecution of this action and not chargeable to the defendant Phillips.

(d) That the prayer of the Intervenor United States of America is denied.

An appropriate judgment will be entered as herein provided.

JUDGMENT

Based upon the Memorandum Opinion, Findings of Fact and Conclusions of Law filed herein this day, the Court enters the following judgment:

1. It is ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc., shall have judgment against defendant Phillips Petroleum Company in the amount of $1,402,800.91 together with accruing interest as provided by law from date of judgment, until paid, for helium sold and delivered during the ten-year period ending December 31, 1972.

2. It is further ordered, adjudged and decreed by the Court that plaintiff Ashland Oil, Inc. shall have judgment against the defendant Phillips Petroleum Company in the amount of $137,210.00 together with accruing interest as provided by law from the date of this Judgment until the Judgment is paid as reasonable attorneys' fees in the prosecution of this action.

3. It is further ordered, adjudged and decreed by the Court that Ashland Oil, Inc., on receipt of the payment of the helium together with interest thereon, as provided in item (1) above, shall deduct therefrom its expenses of prosecution in the amount of $57,685.49 and pay to its royalty owners on the basis of payments heretofore made to its royalty owners for gas sold and delivered and transported in interstate commerce one-half of said helium receipts together with its one-half of the accrued and accruing interest.

4. It is further ordered, adjudged and decreed by the Court that the defendant Phillips Petroleum Company pay the usual and ordinary costs of this litigation as provided by the Federal Rules of Civil Procedure.

5. It is further ordered, adjudged and decreed by the Court that the prayer of the Intervenor, United States of America, be, and the same is hereby denied. The defendant Phillips Petroleum Company has made no claim for relief as against the United States of America.

APPENDIX E

Section 11 of the Helium Act of 1925, as added by the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. 1671, provides:

> The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

Sections 1(a) and 1(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717(a) and 717 (b) provide:

> (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate dis-

tribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-530

UNITED STATES OF AMERICA,
Petitioner,

vs.

ASHLAND OIL, INC., ET AL.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 2, 1977

*Counsel upon whom service is to be made.

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinions delivered in the courts below (App. B, 3a, and App. D. 64a) are reported in 554 F.2d 381 (10th Cir.), and in 364 F.Supp. 6 (N.D. Okla.). An earlier opinion by a panel of the Court of Appeals (App. C, 44a) was withdrawn on grant of rehearing en banc, and was not published.

QUESTIONS PRESENTED

1. Should this Court review the determination made in *Northern Natural Gas Company* v. *Grounds,* 441 F.2d 704 (10th Cir.), that gas producers supplying helium to natural gas pipeline helium extractors are entitled to payment of a reasonable value for their helium, when the same argument made by petitioner was fully presented in that case, when it was presented both by the helium extractors and the United States in connection with petitions for certiorari which were denied by this Court in January, 1972; when, since then, another panel of the court of appeals and the entire court of appeals, sitting *en banc,* have separately considered and again rejected the same argument, without dissent on this issue; and when that determination is demonstrably correct?

2. Did the court of appeals properly approve a valuation for helium in natural gas based upon competitive market value of extracted helium, less extraction costs, when both federal and state law require that valuation method to be applied, under the evidence and under the district court's factual findings?

STATUTES INVOLVED

Subsections (a), (b), and (c) of Section 4 of the Natural Gas Act, 52 Stat. 82, 76 Stat. 72, 15 U.S.C. Sec. 717c; and Section 11 of the Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. Sec. 167i, are reprinted in the Appendix to this brief, *infra.*

STATEMENT

We have stated the genesis and progress of this litigation in our Brief in Opposition to the Petition for Writ of Certiorari filed by Phillips Petroleum Company, in No. 77-221 (certiorari denied, October 31, 1977), and will not repeat that factual statement.

However, the Petition filed by the United States fails to state material facts supporting the judgment of the court of appeals, and relies largely on unfounded assumptions which distort the true reasons which compelled the judgment below. We shall therefore refer to documented facts necessary to view the case in true perspective.

Prior to 1960, the United States had built several helium extraction plants, and was the sole commercial extractor marketing helium. (554 F.2d at 386). During the 1950's, coincident with the technological explosion in science and industry, demand for helium rose spectacularly for numerous indispensable uses. It became clearly foreseeable that demand would continue to increase during the very time that existing reserves of helium contained in natural gas were being depleted, with the result that depleting gas reservoirs would not be able to supply helium required for these necessary uses.[1]

By 1958, the United States Department of Interior had completed comprehensive studies demonstrating that helium from the Hugoton-Panhandle fields would be required for governmental and commercial needs. (R. Ex.

1. As early as 1958-1959, private industrial concerns conceived preliminary plans for building private helium plants to extract helium from natural gas being produced from the Hugoton-Panhandle fields which contained the principal remaining reserves in the free world. (*Grounds.* R. Vol. III, 1011,1017).

Vol III, 556).[2] Unless the helium were extracted before the natural gas was consumed for fuel purposes, it would be irretrievably lost. In the latter event, helium demand could only be supplied from a few isolated presently non-commercial sources at production costs up to $350.00 per m.c.f. of helium, with the remainder obtainable only from the trace of helium in the atmosphere at a cost then estimated to be $10,000.00 per m.c.f. (R. Ex. Vol. VI, 1131, R. Ex. Vol. II, 296).

Thus, the Department of Interior proposed to Congress that amendments be made to the existing Helium Act, to enable the United States to extract helium from the existing inexpensive sources for future sale and use. From extensive committee hearings on the proposed amendments, Congress was fully aware that the natural gas containing the helium was regulated as to rates and transportation pursuant to the Natural Gas Act. The language of Section 11 of the Helium Act Amendments, in excluding helium from the Natural Gas Act, was carefully worked out by the Senate committee together with the Federal Power Commission. (R. Ex. Vol. V, 919). The legislative history proves beyond question that the statute says exactly what was intended—that the provisions of the Natural Gas Act are not applicable to the sale of helium "either prior to or subsequent to" the extraction of the helium. (441 F.2d at 718). The necessary consequence was to make clear that Federal Power Commission rates allowed for natural gas constituted payment *only* for the jurisdictional natural gas, and could not legally be considered a payment for the unregulated, nonjurisdictional helium.

2. Citations designated "R." will be to the ten volumes of the printed Appendix in the Court of Appeals.

In the House subcommittee hearings, Section 1 of the proposed amendments (ultimately §3), providing for helium acquisition, and eminent domain powers, was subjected to intense scrutiny. As proposed by the Interior Department, that section would have made no mention of any payment for the value of helium as a commodity.[3] Congressman Rogers, Chairman of the Subcommittee on Mining, however, presented a revised version on this point which was ultimately enacted.[4] The enacted revision provided that if the helium could not be obtained by contract for "market value", that it should be obtained by condemnation, "the just compensation for such condemnation to be measured by terms and prices determined to be *commensurate* with the fair market value. . . ." 50 U.S.C. 167a(a)(2). (Our emphasis).

The foregoing version was approved after Congressman Rogers, in an interchange concerning market value with Undersecretary Bennett, made clear that the helium value was to inure to the benefit of those having interests in the helium, back to the initial interest holders, the royalty owners from whose lands the helium was produced with the natural gas. (R. Ex. Vol. IV, p. 827). It was enacted despite express objections of the Interior Department. (R. Ex. Vol. IV, 829).

It was also developed in subcommittee hearings that "there is no such thing as a true competitive market for helium" (R. Ex. Vol. V, p. 867), and thus there was no market price except the arbitrary price set by the government under its then existing monopoly. The only suggestion made as to the means for determining, in a condemnation action, a value "commensurate with a fair market

3. R. Ex. Vol. IV, 703, 725, 817, 829.

4. R. Ex. Vol. IV, 711-719, 821.

value" was to consider the value of helium extracted by industry and sold in a competitive market, in connection with the costs incurred in its extraction. (Hearings Before Subcommittee on Mines and Mining, pp. 38-39, 103, 105, March, 1960). Indeed, the Department of Interior was well aware that the government, when earlier called upon to account for the wellhead value of helium, had used the so-called value-less-expense, or "workback" method, which it described as an established principle in the gas industry. (R. Ex. Vol. II, p. 298). The wellhead price for commingled helium so calculated was thereafter used in several instances as a basis for helium payment by the government in obtaining supplies for its helium plants. (R. Vol. III, 634-635).

In light of these facts, the price provisions of the helium conservation contracts entered into in 1961 between the government and the helium extracting companies (such as Phillips Petroleum Company) become most significant For, as noted by the court of appeals (554 F.2d at 384, 389), the base prices in the contracts were negotiated specially without any relationship to market value, leaving open the ultimate price to be paid when the amount owing to third parties supplying the helium (such as Ashland Oil, Inc.) was ultimately determined. The manner in which the helium extractors and the government were to share such payments to helium suppliers insured that the government ultimately would pay an amount commensurate with a competitively established fair market value. Phillips was obligated to pay third parties only \$3.00 per m.c.f. out of its base price proceeds, and the government would pay an additional price for the balance awarded the helium suppliers. (R. Vol. I, 91-95). However, in return for that limitation of liability, the helium extractors (including Phillips) agreed that they and their

affiliates would not receive any additional payments for helium which they themselves produced and supplied. Phillips Petroleum Company, for example, produced 50% of all the helium to be extracted by it. Thus, any payment to third-party suppliers based on the work-back method would result, on the average, in the government obtaining the helium at a price "commensurate with" competitively established market values for extracted, marketable helium.

The decision by the court of appeals in this case recognized the obvious fact that in the 1960's a competitive market value in a free market was established for helium sold as a commodity for beneficial use. But there did not exist any market value for commingled helium at the wellhead, because the helium was commingled in jurisdictional natural gas which gas producers were required by FPC regulation to continue supplying at an FPC rate applicable only to the natural gas. As noted by the Court, 554 F.2d 386:

> ". . . There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases. The helium thus had to go along with the stream."

The decision by the court, sitting *en banc*, therefore, approved the use of the work-back method of valuation for the commingled helium, noting the established industry and government practice, as well as the federal and state decisions which commonly utilize this method for valuing one component of a gas stream. Since extracted helium had a known fair market value established competitively in a free marketplace, the value of the helium prior to extraction obviously had that value, less the economic contribution made by the extractor. The extractor is paid

for his contribution by a return of all costs, and a fair profit, or rate of return. The balance represents the value of commingled, unextracted helium.

The valuation method, thus, is not only simple, but is accurate in being directly derived from the known market value of the commodity at a point close in space and time.[5]

Moreover, the decision below effectuates the intent of Congress that those having interests in the helium be paid commensurate with fair market value. Producers recovering the reasonable value for their helium pay an appropriate royalty to the landowners from whose lands the helium is produced.

Upon further depletion of the present reserves, the helium acquired by the government will be purified and sold so as to recover all acquisition and storage costs, including interest, at no ultimate cost to the taxpayers. (R. Vol. III, 650). At the same time, the purpose of the stockpiling program in making this helium available for indispensable uses in government and industry, will have been accomplished.

5. One minute elapses from the entry of commingled helium into the extraction plant until its completed extraction.

ARGUMENT

Northern Natural Gas Company v. *Grounds*, 441 F.2d 704 was decided based upon a massive record, after extensive briefing and extended oral argument. The court of appeals denied petitions for rehearing *en banc*, and this Court denied certiorari, 404 U.S. 1063, after considering the same argument now made again by the United States. The court of appeals, sitting *en banc* on rehearing below, correctly rejected the same argument now made, in applying the holding in *Grounds* that Ashland Oil, Inc. and its royalty owners were entitled to recover the reasonable value of their helium. The present petition by the United States fails to consider historical facts which require this conclusion; fails to deal with the reality that producers were unable to negotiate for or obtain any payment for helium short of judicial decree; and fails to state what Section 11 of the Helium Act means, if it does not mean what it expressly provides.

The valuation method applied by the district court, and approved by the court of appeals, is an established method in the industry and is used by the government itself, in determining the value of one component contained in a gas stream. The method is regularly applied by both federal and state courts, and is recognized as appropriate by oil and gas scholars. It removes the question of value from speculation, and ties it to the known value of the commodity after extraction. Application of this method merely requires the government ultimately to pay a price "commensurate with the fair market value" as required by law. The government did not create that value, but rather obtained helium as a commercial commodity for a known market, in which it will recover all its costs.

I. The Petition Presents Unsound and Inadequate Reasons for Review of the Grounds Decision, in Which This Court Denied Certiorari Six Years Ago.

Before discussing the basic fallacy inherent in the Petition of the United States, which seeks review of the *Grounds* decision, followed herein by the court of appeals, *en banc*, several practical principles of jurisprudence, such as finality, judicial economy and avoidance of delay, should be considered.

The interpleader suits in *Grounds* (441 F.2d 704) were filed in Kansas in 1963. Upon a massive record containing a complete legislative history of the Helium Act Amendments of 1960, and containing complete and detailed facts relating to the factual and legal impact of FPC rate regulation of natural gas upon the price provisions of natural gas contracts, the *Grounds* decision held, in 1971, that producers supplying helium for extraction had received no payment for it.

After denial of motions for rehearing *en banc*, this Court denied certiorari in January, 1972, considering as insufficient the very reasons now advanced, which had been formally presented by the United States in support of the helium extractors' similar arguments. [404 U.S. 1063 (1972)]. Since January, 1972, the *Grounds* case has been relied upon in protracted proceedings at the trial and appellate levels. In the instant case another panel of the court of appeals, and later the *en banc* six-judge panel, have separately considered and denied the same arguments opposing liability, without a single dissent on this issue.

In the meantime, those who long ago were held entitled to recover a value for their helium are deprived of it at an obsolete rate of interest; while every year royalty

owners and others grow old or die without receiving the value due them. It is, therefore, less than comforting, though true, to see that the United States concedes that a review of the holding in *Grounds,* even if it resulted in reversal, would simply require a remand for a determination on other theories of recovery not heretofore ruled upon—other causes which, if sustained, would result in more petitions to this Court. (Petition, p. 22).

Whatever the finespun technicalities, we suggest the *Grounds* decision should be accorded finality at this time. We proceed, however, to answer again the arguments made by the United States.

The most patent error in petitioner's argument stems from its inability to explain away the clear meaning of Section 11 of the Helium Act Amendments. Section 11 states that the Natural Gas Act does not apply "to the sale . . . of helium . . . prior to . . . the separation of such helium from the natural gas. . . ." Senate Report No. 1814 stated that its purpose was to make "clear that the Federal Power Commission retains its jurisdiction over natural gas containing helium but has no jurisdiction over helium itself."

As stated in *Grounds*, 441 F.2d at 721:

> "In our opinion this means what it says and, if the Natural Gas Act does not apply, a service rate fixed thereunder does not apply to sales of contained helium."

The inevitable result is that an FPC service rate which becomes effective under the Natural Gas Act does not, and legally cannot, be considered a payment for nonjurisdictional helium. It is a payment only for jurisdictional natural gas. From the leading case of *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566 (1921), to

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), to the present time, the invariable rule of federal rate regulation is that the regulated or filed rate must be paid for the jurisdictional commodity or service, neither more nor less, regardless of the assent or dissent of the parties.

Indeed, Ashland Oil itself felt the full force of the filed rate doctrine as an outgrowth of this very case. For the FPC ruled that Ashland could not collect from Phillips over one-half million dollars in deficiencies below the contract price because Ashland had not timely filed for the increases under the Natural Gas Act. The FPC decision[6] stated:

> "Our conclusion is consistent with the filed rate doctrine under which the effective rate on file with the Commission is the only rate that may be charged or collected for the sale of natural gas in interstate commerce. . . . (citing cases)".

The *Grounds* decision recognized the same necessary conclusion in holding that the "filed rate, is the lawful rate and there may be no deviation therefrom. . ." (441 F.2d at 720).

Since the filed, lawful rate for natural gas supersedes any contract price at variance, it follows that an FPC rate constitutes payment only for jurisdictional natural gas, and cannot constitute any payment for unregulated helium. Otherwise an unlawful deviation would occur in violation of the express statutory provisions.

This is also the reason the FPC recognized in *Phillips Petroleum Company* v. *Ashland Oil & Refining Co.*, 40

6. *Phillips Petroleum Company* v. *Ashland Oil & Refining Co.*, 40 F.P.C. 390, affirmed in 421 F.2d 17 (6th Cir. 1970).

F.P.C. 390, after referring to this case pending in the district court; ". . . the Commission has no jurisdiction over the price of helium."

Having established that FPC rates do not and cannot be considered payment for unregulated helium, what result must follow? In no instance is there an express contract covering sale of helium as a separate commodity. And the only contract applicable to the composite gas stream has been superseded as to price by FPC rates, which cannot cover helium.

In *Phillips Petroleum Company* v. *Texaco*, 415 U.S. 125 (1974), this Court had no difficulty in recognizing why the *Grounds* decision required the helium extractors to pay reasonable value for the helium supplied to them. Since payment of any price "at rates established or permitted by the Commission under the authority of the Natural Gas Act will not be regarded as payment for the helium constituent", such payment cannot be asserted as a defense in a quasi-contractual suit, or an action in *quantum meruit*, having its source in state law. (415 U.S. at 126, 128, 129).

Quantum meruit refers to that class of obligations "Imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice." *Carpenter* v. *Josey Oil Co.*, 26 F.2d 442 (8th Cir.).

In other words, since federal law requires that an FPC rate for natural gas cannot be a payment for helium, the common law concept of *quantum meruit* requires payment for delivery of a commodity of value, as to which no payment has yet been made.

The petitioner is silent concerning this Court's logical analysis of *Grounds*. Petitioner, instead, states that

Grounds holds that the payment for helium is required by "federal regulatory policy". As we have seen, payment is required by the principle of *quantum meruit* under state law, simply because the payment of natural gas under federal law was only for natural gas, not helium.

Grounds did refer to Section 4(b) of the Natural Gas Act, 15 U.S.C. Sec. 717c(b) as forbidding "any undue preference or advantage" to any person. 441 F.2d at 720. But it did so only in connection with the proposition that FPC rates for natural gas could not be payments for non-jurisdictional helium. Otherwise an unlawful deviation would exist.

Only if the state common law of quasi-contract and *quantum meruit* were unavailable as a remedy, would it be necessary to reach the question of whether federal law itself should imply a cause of action requiring payment for helium, in order to prevent unlawful deviation from federal natural gas rates, or to prevent "any undue preference or advantage" to any person. Obviously, if state law requires the payment, there is no necessity to consider whether a federal cause of action must be implied from the statutory provisions in order to prevent unlawful deviation, undue preference or advantage. Cf., *Cort* v. *Ash*, 422 U.S. 66, 78, 84 (1975).

Petitioner, thus, has confused the issue. The federal statutes require that the payment of FPC rates not be considered any payment for helium, as the FPC itself recognizes. State law requires payment of the reasonable value of the unregulated helium, for which no payment has been made.

Petitioner's strained, circuitous effort to circumvent these established principles, based upon erroneous assumptions which are contrary to the Record, must be rejected, as they have been repeatedly below.

The second basic error found in the Petition is the assertion that if the Federal Power Commission had no jurisdiction over the price of helium "what follows is that the parties were free to negotiate whatever price they desired for the helium content. . . ." (p. 17). This statement is contrary to a mass of undisputed evidence, and is devoid of logic or reason.

Virtually all the helium-bearing natural gas involved was contracted for and sold interstate prior to 1954, when it was required to be regulated by the FPC, *Phillips Petroleum* v. *Wisconsin*, 347 U.S. 672. As noted in *Grounds*, these contracts commonly provided for periodic price escalation, arbitration, or renegotiation. (441 F.2d at 722). A typical provision, contained in a 1948 Ashland Oil contract, provided for a single price per m.c.f. on the mixed stream, and did not permit a separate value to be ascribed to helium. As a result, the purchaser, Cities Service, insisted on fixing a single price, making it impossible for Ashland to obtain a separate, unregulated price for the helium content.[7]

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7. Petitioner misinterprets that periodic price arbitration, and the effect of FPC regulation on it, in footnote 26, p. 19 of the Petition. Petitioner says that example "does not demonstrate that the Federal Power Commission refused to permit a seller compensation for its helium, since the helium issue was not presented to the Commission. But even if it did, it would only demonstrate that under the Court's holding in *Grounds*, the Commission's action was erroneous and could have been corrected on review. . . ."

The whole point of the *Grounds* holding was that the FPC had *no jurisdiction* of any price for helium, so that it could take no action whatsoever one way or the other on it. It was not the FPC which refused, or did not refuse, to permit helium compensation. The FPC had no jurisdiction on that point. What deprived Ashland of any means of obtaining a value for helium as an unregulated commodity was the frustration of contract prices by the imposition of rate regulation on the natural gas, but not on the separate commodity, helium.

The simple economic fact of life was, and is, that as long as the helium extractors had the federal right, under FPC regulation, to require continued deliveries of the natural gas, they could ignore the helium suppliers with total impunity, so far as helium was concerned.

As the *en banc* decision below reiterated:

> ". . . . There was not an opportunity for free pricing at any point, nor for renegotiation of sales or the negotiation with new purchases." (554 F.2d at 386).

The elementary fact, ignored by petitioner, is that the contracts, and the periodic price escalation and renegotiation provisions, were entered into upon the premise that the seller should receive, and the purchaser pay, current market values at the times of delivery as established *in a free competitive market, for all elements of the gas stream.* Thus, there was no occasion, in pricing, to segregate various gaseous elements in the stream. But when, thereafter, natural gas was regulated, but helium contained in the stream was not, the gas purchasers found themselves in the apparently advantageous position of paying a regulated rate for the natural gas only, but being able to receive, for nothing, the commingled unregulated helium.

As held in *Grounds,* the contract prices were superseded by FPC approved rates—and FPC rates were jurisdictionally and legally a payment only for jurisdictional natural gas. Although the United States repeats conclusions concerning freedom to negotiate for a helium price, it nowhere points out any practical, actual manner in which this can be accomplished. No evidence exists, or is referred to by the United States, which in any way detracts from the considered judgment in *Grounds* that, "The regulated lessee-producers must continue to sell the dedicated gas

and have no statutory or contractual method of obtaining any benefit for the increased value." (441 F.2d at 722).

In light of the foregoing, the assertion that, "With one possible exception, no producer in those cases [*Grounds*] has been impeded by the Commission in any effort to negotiate separately with respect to helium" (Petition, p. 20), becomes meaningless and absurd. From July, 1963, when the *Grounds* cases were filed, the helium extractors took the position that, having paid FPC rates for natural gas, they did, and would, *refuse* to pay for helium, regardless of contract provisions for renegotiation or escalation, and regardless of the fact that helium had become a separate commodity of value not included in FPC rates for natural gas. In point of fact, Ashland's aborted attempt to obtain an arbitrated value for unregulated helium, while that litigation was in progress, was an exercise in futility which could only demonstrate, in the pending litigation,[8] the truth of what was already obvious; that there was a total absence of freedom to negotiate or obtain a value for helium itself.

In a similar manner, Ashland's escalation of contract prices to Phillips has been directly limited by FPC regulation of Phillips' own resale prices, and Ashland's proceeds have been limited to FPC rates filed, regardless of contract price.[9]

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8. In footnote 27, p. 20, petitioner refers to some gas contracts mentioning helium, as support for its contention that free negotiation could occur. Unfortunately, as noted by the Court of Appeals, these were recent contracts involving gas which contained no helium. This "meaningless gesture of the parties" has no evidentiary value. (554 F.2d at 386).

9. Other types of contract frustration by FPC regulation occur when a term contract expires, but deliveries must continue so that unilateral rates may be filed; when an FPC rate settlement is made and a contract amended to conform thereto for filing purposes; and when a contract price is lower than the FPC *minimum* rate for natural gas, to name a few.

But, in demonstrating the nearly universal frustration of gas contract price provisions by FPC rate regulation, we must not overlook the truth that Congress has specified that FPC rates cannot constitute a payment for commingled helium. Any contract filed results in an FPC service rate, whether the contract price is modified or not. There is no longer a contract price, but a regulated rate for natural gas only. Thus, gas producers delivering helium and receiving only FPC rates for natural gas, have a *quantum meruit* right to recover for the reasonable value of the unregulated commodity which is extracted for the commercial market. The relevancy of demonstrating actual frustration of contract prices is simply to support the good reasons Congress had to enact the law as it did, and to demonstrate the inherent injustice of allowing those who obtain the helium now, and who will use it in the future, to obtain enormous economic benefit from it, with no compensation to those who have initially owned it and supplied it to this nation.[10]

II. The Court of Appeals Correctly Approved the Commonly Used Method for Valuing One Component of a Gas Stream Which Is Extracted for Beneficial Use.

Petitioner asserts that federal law should be applied to the question of helium valuation, as it is in condemnation cases. Yet the petition is notably silent in stating the substance of that law. It relies solely on a single dissent from the six-judge *en banc* decision. The dissent, in turn, cites no authority whatsoever applicable to the

10. The Petition refers to helium, when not extracted, as being worthless because it is wasted. The Record conclusively establishes that helium *extracted for beneficial use* had values ranging from $20.00 to $35.00 per m.c.f. during the period in question.

facts of this case.[11] In the factual situations presented, both federal and state decisions have uniformly approved the valuation method adopted by the district court and approved, with modification, on appeal. (554 F.2d 385-388).

The necessity of using a "workback" method of valuation can be illustrated by the common practice of the industry concerning extraction of natural gas liquids from natural gas. The gas stream is normally composed of different types of gases which can be extracted as liquids, such as natural gasoline, butane and propane. The majority of the stream is methane. The gas stream also contains nitrogen, and, in the Hugoton area, helium.

Many gas producers make arrangements with extraction plant operators to build extraction plants in order

11. Judge Doyle had earlier concurred in the panel decision approving the valuation method. On rehearing *en banc*, he dissented, apparently because of a mistaken view of the impact upon the government, and a failure to recognize the commercial nature of the helium stockpiling program.

The district court in Kansas (on remand by the Court of Appeals in *Grounds*), erroneously rejected the workback method without discussion of the governing cases, stating merely that the price of wheat is not determined by the retail price of bread. (393 F.Supp. at 982). Yet it is universally held that the value of wheat prior to harvesting is the market value of wheat less the cost of harvesting, an analogy closely in point since both unharvested wheat and commingled helium must be extracted or removed from extraneous materials in order to make either product marketable for beneficial use. See, *United States* v. *576.734 Acres of Land, etc.*, 143 F.2d 408, 409 (3rd Cir.); *International Harvester Company* v. *Kesey*, 507 S.W.2d 195 (Tex. S.Ct.); *Stafos* v. *Missouri Pacific Railroad Company*, 367 F.2d 314, 320 (10th Cir. Kan.).

The Kansas court did not find any comparable transactions which could establish market value, but rather based its value finding on an engineer's erroneous calculations relating to the economics of five totally different and noncomparable helium plants (393 F.Supp. at 984), ignoring that one of these, the Kerr-McGee plant, accounted to helium suppliers under a formula utilizing the workback method, for an average of $9.30 per m.c.f. of commingled helium, even though its unit costs of extraction were higher than the conservation plants.

to extract and market some of the elements as gas liquids. The gas liquids, once extracted and marketable as such, have the same competitive market value f.o.b. the extraction plant, no matter from which plant extracted. Yet the economics of each plant varies widely, because of the volumes of liquids available for extraction at that plant, the size of the plant, and other economic circumstances. For this reason, any such arrangement provides for the plant extractor to keep a percentage of the value after extraction for his expenses and profit, and a payment of the remainder to the producer-supplier. This results in the producer receiving, for commingled product value, from 90% down to as low as 10% of the value *after* extraction, in each instance depending upon the value after extraction, less the extraction costs and operator's profit.

This same basic method was used by the government to determine wellhead value of commingled helium. The Director of the Geological Survey himself referred to the above industry practice in determining the propriety of that method for valuing helium. (R. Ex. Vol. II, 298-299). This method was approved in *Navajo Tribe* v. *United States,* 364 F.2d 320, 176 Ct. Cl. 502 (federal law). It was also the method utilized, as adjusted upward in litigation, to determine value of helium supply to the private Kerr-McGee helium plant in Arizona.[12]

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12. The United States was paid for helium from its lands on that valuation basis. (554 F.2d at 387). (The plant is now closed for lack of helium supply.)

The Director of the Geological Survey is extremely conversant with the extracted value-less-expense method, because he is required by law to collect royalties for components extracted from gas streams produced from federal lands on that basis. Validity of the federal method was upheld in *United States* v. *General Petroleum Corporation,* 73 F.Supp. 225, 254-257 (S.D. Calif.), affirmed, *Continental Oil Co.* v. *United States,* 184 F.2d 802 (9th Cir.).

(Continued on following page)

The practical rationale of this industry method is rooted in economic reality. Any one component of a gas stream may be worth very little if marketed as part of a natural gas stream. But if the component, such as helium, is considered worth extracting for a known market, and it is so extracted, it then has the value which has been established in that market. That market value, in turn, has no relationship to the value of the unextracted component when delivered for a totally different market as part of a gas stream. By allowing for the economic value of the extraction operation, the reasonable value of the product prior to extraction is readily ascertained.

The reason why market values for one component in a gas stream to be extracted do not develop is because supply conditions and other economic factors are variable, and differ from plant to plant. In the case of helium, the even more compelling reason was noted by the court of appeals, 554 F.2d at 386. There was no opportunity or freedom to negotiate or obtain any value for helium inasmuch as the helium extractors received the natural gas stream in return for payment of only FPC rates for the jurisdictional natural gas. Only litigation could determine the obligation, and the amount of liability, as the United States and the extraction companies themselves

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Footnote continued—

The same basic federal valuation requirement is found today in 30 C.F.R. §221.51, which specifies a wellhead royalty on a minimum of one-third of the value of the extracted product, but proportionately more if extraction cost is less.

This federal law is, we presume, one reason why petitioner treats the question in a cursory manner, without citation of authority.

If state law applies, Texas law is clear in applying the same valuation method. *Mobil Oil Corporation* v. *Calvert,* 451 S.W.2d 889, 892 (Tex. S.Ct.); *Phillips Petroleum Co.* v. *Johnson,* 155 F.2d 185 (5th Cir. Tex.).

realized, in the price formula providing for such payment based on the anticipated litigation.

Petitioner makes the specious argument that the government created the value of helium it purchased, so it should not be required to pay for it. This argument, initially raised below, but apparently abandoned on the *rehearing en banc*, is effectively answered by the court of appeals:

> ". . . The issue here is the determination of value of a commodity which was purchased and sold by the Government and by private concerns. It was a stockpiling of a commercial product. This cannot be equated to the cases where the condemnation or the reason for condemnation increases the value of the land taken. The helium has value by reason of its nature and usefulness. The Government may have made this helium available but did not create its value." (554 F.2d at 388, 389).

The government, since 1961, has sold helium commercially for $35.00 per mc.f. f.o.b. extraction plants. Since then, private extractors have built plants at locations where the government once anticipated expanding its conservation program. A temporary surplus helium production capacity occurred for this reason, so that competitive helium market values during 1963-1972 ranged from $35.00 to $20.00 per m.c.f. This temporarily depressed price will soon vanish as helium supply for private plants is depleted, but the government will wisely have acquired the helium during that time period.

Contrary to any other government stockpiling of a commercial product, the government seeks to obtain helium for far less than prices commensurate with its market

value. This was, indeed, the position of the Interior Department from the very beginning, but its position was overruled by Congress, and its position is contrary to the settled law upon this subject. The entire helium conservation program, of course, involves millions of dollars in liability, because millions of m.c.f.'s (one thousand cubic feet) of helium were obtained by the government, over a ten-year period, from tens of thousands of royalty owners and many hundreds of producers. Nevertheless, petitioner, and the dissent below, have greatly exaggerated what is at stake.[13]

The commercial nature of the government's acquisition is also demonstrated by the fact that the government will sell all this helium for more than enough to pay all acquisition costs, plus interest, at no cost to the taxpayers. Even now, private parties are storing huge quantities of helium for their own account for future sale, proving beyond question the commercial nature of the stockpiling program.

The valuation issue is undoubtedly a factual question (554 F.2d 385), subject to appropriate legal standards. The legal standards applied in this case were fully supported by the evidence, in accordance with a long line of federal and state cases. Review by this Court is unwarranted and could only serve to delay these already prolonged, interminable proceedings.

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13. The 36,500,000 m.c.f.'s of stored helium referred to is the total stored not only under the conservation contracts, but by the government from its own plants, and by private parties for their own accounts. Additionally, all helium from the conservation helium extractors which they or their affiliates produce is not subject to any claims by producers. The actual amount in litigation approximates 20,000,000 m.c.f.'s of helium.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX

Section 4 of the Natural Gas Act, 52 Stat. 822; 76 Stat. 72, 15 U.S.C. Sec. 717c, subsections (a), (b), & (c), provide:

"(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Section 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. Sec. 167i, provides:

> The provisions of the Natural Gas Act of June 21, 1938, as amended, shall not be applicable to the sale, extraction, processing, transportation, or storage of helium either prior to or subsequent to the separation of such helium from the natural gas with which it is commingled, whether or not the provisions of such Act apply to such natural gas, and in determining the rates of a natural gas company under sections 717c and 717d of Title 15, whenever helium is extracted from helium-bearing natural gas, there shall be excluded (1) all income received from the sale of helium; (2) all direct costs incurred in the extraction, processing, compression, transportation or storage of helium; and (3) that portion of joint costs of exploration, production, gathering, extraction, processing, compression, transportation or storage divided and allocated to helium on a volumetric basis.

No. 77-530

Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1977

UNITED STATES OF AMERICA, *Petitioner*,

v.

ASHLAND OIL, INC., *et al.*, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN SUPPORT OF THE PETITION

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MEMORANDUM FOR RESPONDENT PHILLIPS PETROLEUM COMPANY IN SUPPORT OF THE PETITION

Phillips Petroleum Company, a respondent herein, supports the Solicitor General's petition for certiorari. Phillips petitioned for certiorari, No. 77-221, to review the same judgment of the United States Court of Appeals for the Tenth Circuit as is the subject of the Government's petition and is filing, at the same time as this memorandum, a petition for rehearing of the Court's denial of its petition for certiorari.

The Solicitor General's petition makes clear the great practical importance of the decision below in terms of its potentially enormous impact on the United States Treasury. It also lays bare the serious flaws in the decision below and thus highlights the doctrinal significance of what was decided below. We file this memorandum without having seen the response of Ashland Oil, Inc., to the Government's petition; the only attempted defense of the court of appeals' judgment on file at this writing is Ashland's brief in opposition to Phillips' petition, and we deal below with some of the arguments made by Ashland.

I.

The United States in its first question presented disputes the court of appeals' conclusion that Section 11 of the Helium Act and the Natural Gas Act together establish a rule that the price terms of contracts under which Phillips and other companies acquired undisputed title to gas streams, including both natural gas and helium, cannot be enforced as to the helium. The court below reasoned that, because the contracts were filed with the Federal Power Commission, the price terms became "utility rates," and Section 11 precluded the superseding utility rates from applying to the helium component of the gas stream. The Government says that there is no such rule even for contracts that the FPC, in the exercise of its power under the Natural Gas Act, has altered insofar as the combustible gas component of the stream is concerned. The Government says that it is only if the FPC has specifically impeded the parties from freely contracting with respect to the helium content of the gas stream that there could be even a conceivable premise for the

court of appeals' novel rule. Phillips agrees. Phillips' petition also emphasizes that, on the facts of this case, a view narrower than the Government's is enough to discredit the court of appeals' decision. There is no possible basis for the court of appeals' disregarding the price terms of the Ashland-Phillips contracts because the FPC did not interfere at all with their operation even as to the combustible component of the gas stream.[1]

In defending the court of appeals' rule in its brief in opposition in No. 77-221, Ashland has suggested that the Tenth Circuit's interim decision in *Northern Natural Gas Co.* v. *Grounds,* 441 F.2d 704 (10th Cir. 1971), *cert. denied,* 404 U.S. 951, 1063 (1972), which applied the rule largely to contracts different from the Ashland-Phillips contracts in that they had been frustrated by FPC rate regulation, forecloses the issue because "Phillips is, in reality, seeking review of the *Grounds* case, in which this Court denied certiorari more than five years ago." (Br. Opp., No. 77-221, p. 15.) This Court's denial of certiorari in *Grounds* suggests nothing about the correctness of that decision, and that decision cannot foreclose this Court's judgment.

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[1] There is no question of the accuracy of the statement in the text. In its brief in opposition in No. 77-221 Ashland has asserted that its contracts with Phillips were frustrated "because an FPC filing for [an] increase was not promptly accomplished." (Br. Opp., No. 77-221, p. 18.) As pointed out in both Phillips' (Phillips Pet. 5 n.1) and the Government's (U.S. Pet. 7 n.9) petitions, the FPC never prescribed a ceiling rate that interfered with Ashland's ability to obtain the full contract price to which it was entitled under its contracts with Phillips. Rather, it was *Ashland's* failure to make a timely filing with the FPC that resulted in its failure to receive approval for rate increases. *See* Ashland Oil & Refining Co. v. FPC, 421 F.2d 17 (6th Cir. 1970).

Ashland has also said that "this Court in *Phillips Petroleum Company* v. *Texaco,* 415 U.S. 125 (1974), recognized that Phillips' defense of payment was precluded by federal law, giving rise to a claim in *quantum meruit* for reasonable value." (Br. Opp., No. 77-221, p. 16; see also *id.* at 7, 9, 10.) The contention is plainly without merit. This Court in *Texaco* had no need to reach the issue, and it did not purport to do so. Instead, the Court simply *stated,* in the context of holding that Texaco's complaint alleged no basis for federal question jurisdiction, that any cause of action based on *Grounds* would be, "in effect, an action in *quantum meruit,* whose source is state law and not federal law." 415 U.S. at 129. Far from endorsing *Grounds,* this Court held no more than that a cause of action based on the rationale of *Grounds* did not arise under federal law.

Finally, Ashland has defended the court of appeals' rule of utility regulation by quoting and paraphrasing it at length. (Br. Opp., No. 77-221, pp. 15-17.) Ashland tracks, without explanation or reference to any supporting authorities, the strained logic by which the court of appeals was led to the conclusion that, if Phillips paid the contract price for helium after that price was accepted as the "utility rate," it would be receiving valuable helium "for free" and that this could constitute an "undue preference or advantage" under Section 4(b) of the Natural Gas Act. (Br. Opp., No. 77-221, p. 17.) So far as we are aware, there is no supporting authority for this tortured reasoning. That view is confirmed by the failure of either the court below or Ashland to discuss any. Nor is there any supporting legislative history or policy justification advanced on behalf of such a rule. It is almost

inconceivable that Congress intended, in enacting Section 11 of the Helium Act, to provide a windfall of potentially hundreds of millions of dollars to producers that had already, in voluntary bargains, disposed of the helium over which they once had dominion.

II.

The second question the Government presents is the validity of the court of appeals' method of valuing helium if the value that the parties placed on it by contract is not judged controlling. The Government recognizes that the court of appeals applied federal law in valuing the helium but urges that the court's work-back method is not sanctioned by federal law. Phillips concurs but has presented in its petition the anterior question whether the court of appeals was correct in choosing federal law. The Government agrees that the question which law applies is an important one. (U.S. Pet. 25.)

Ashland in its brief in opposition in No. 77-221 has tried to evade that important question. Contending that the "work-back" valuation method approved by the court is "widely used in the oil and gas producing states" (Br. Opp., No. 77-221, p. 14), Ashland suggests that the "work-back" method is "regularly appl[ied] . . . in appropriate circumstances, involving applications of both federal and state law" (*id.* at 15). It does not address the source of the "work-back" methodology applied by the district court and accepted by the court of appeals; it concedes only that the court of appeals applied federal law to lift the bar of the statute of limitations and to subject Phillips to the payment of pre-judgment interest.

Ashland cannot thus put the important choice-of-law question to rest by ignoring it. There is no doubt that the peculiar version of "work-back" adopted and endorsed by the court below was an attempted application of federal law. It is the product of the district court's erroneous belief that it was trying a federal condemnation case arising under federal law. (Phillips Pet. 7-8, 12.) Consistent with that belief, Phillips is obliged by the court of appeals' judgment to pay Ashland for the "reasonable value" only of the portion of the helium content extracted for the Government.

In any event, on the merits of the court's valuation method, the Government is right in saying that it "affronts ordinary concepts of value, produces a windfall for Ashland, and by virtue of the indemnity agreements could impose a heavy penalty on the government." (U.S. Pet. 23.) And, it should be added, the method penalizes Phillips and the other helium contractors even if the indemnity agreements are enforceable because there is a threshold price below which the companies do not stand to be indemnified.

CONCLUSION

The Government's petition should be granted. It presents important questions that should be resolved by this Court.

Respectfully submitted,

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